No. 80-348

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

H.A. ARTISTS & ASSOCIATES, INC., S.T.E. REPRESENTATION LTD., J. MICHAEL BLOOM, LTD., DON BUCHWALD & ASSOCIATES, INC., MARJE FIELDS, INC., HENDERSON/HOGAN AGENCY INC., OPPENHEIM-CHRISTIE ASSOCIATES LTD., JOEL PITT LTD., TALENT REPRESENTATIVES INC., D.M.I. TALENT ASSOCIATES, LTD., JEAN THOMAS AGENCY, INC., BOB WATERS AGENCY, INC., JACOBSON-WILDER, INC., WILLIAM D. CUNNINGHAM & ASSOCIATES, INC., TRANUM ROBERTSON & HUGHES, INC., MONTY SILVER AGENCY LTD., BRET ADAMS, LIMITED, MICHAEL THOMAS AGENCY, INC., LESTER LEWIS ASSOCIATES, INC., LEAVERTON ASSOCIATES LTD., JOE JORDAN TALENT AGENCY INC., RAGLYN-SHAMSKY, LTD., ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

—against—

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

The questions presented must be considered in light of major factual differences between *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 (1967) *("Carroll"),* the authority followed by the Courts below and this case. In *Carroll, supra,* the defendant union did not have a collective bargaining agreement with the employers of the union's members and the booking agents, who obtained jobs for the union members, were not licensed as employment agencies under New York State law. In the present case, Actors' Equity Association ("Equity" or the "Union"), the defendant union, has collective bargaining agreements with the employers of its members which set forth the minimum wages the employers must pay union members and the theatrical agents are licensed as employment agents.

The questions presented for review in this petition, under these circumstances, are:

1. Should the holding in *Carroll* that booking agents are members of a "labor group" and thus can be regulated with antitrust immunity by the union whose members they represent be confined to fact situations where the union does not have a collective bargaining agreement with the employers of its members?

2. Should *Carroll,* which primarily dealt with a union's regulation of orchestra leaders (who are themselves union members) who compete with union members and who employ union members, be overruled to the extent that it holds that agents who are employed by union members are part of the union's "labor group"?

3. Should the holding in *Carroll* permit Equity to unilaterally forbid franchised theatrical agents from charging

commissions on scale or minimum jobs obtained for Equity members?

4. Should the holding in *Carroll* be extended to permit the Union, which prohibits its members from employing theatrical agents who are not franchised by the Union, to extract franchise fees from theatrical agents as payment for the right to be regulated and dominated by the Union?

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Petitioners,

—against—

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 23, 1980.

Opinions Below

The opinion of the Court of Appeals [reported at 1980-2 CCH Trade Reg. Rep., ¶ 63,376 (2d Cir. 1980)] is attached

as Appendix A to the petition. The opinion of the District Court is reported at 478 F.Supp. 496 (S.D.N.Y. 1979) (Motley, J.). A copy of that opinion is attached as Appendix B to this petition. An earlier decision of the Court of Appeals, a copy of which is attached to this petition as Appendix C, affirmed the District Court's denial of a motion for a preliminary injunction, a copy of which is attached to this petition as Appendix D.

Jurisdiction

The judgment of the Court of Appeals was entered on May 23, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

Statutes Involved

1. Section 1 of the Sherman Act (15 U.S.C. §1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared illegal . . ."

2. Section 2 of the Sherman Act (15 U.S.C. §2) provides, in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

3. Section 6 of the Clayton Act (15 U.S.C. §17) provides, in pertinent part:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust

laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

4. Section 20 of the Clayton Act (15 U.S.C. §52) is attached to this petition as Appendix E.

5. Sections 5-15 of the Norris-LaGuardia Act (29 U.S.C. §§105-115) are attached to this petition as Appendix F.

6. Sections 180, 183 and 185 of Article 11 ("Employment Agencies") of the General Business Law of the State of New York (McKinney 1968) are attached to this petition as Appendix G.

Statement of the Case

A. *Introduction*

Petitioners are theatrical agents (sometimes hereinafter referred to as "Agents"). Equity is a union whose members include virtually all actors appearing in legitimate theatrical productions in the United States. Respondent, Donald Grody, is Executive Secretary of the Union.

This is an action for injunctive relief (only) under §16 of the Clayton Act (15 U.S.C. §26) alleging that the Union's conduct is violative of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2). The Agents claim that the Union's compulsory franchising system for theatrical agents which

prohibits Union members from dealing with nonfranchised agents such as petitioners, constitutes a price fix, an agreement not to compete, a group boycott of nonfranchised agents and monopolization, in violation of the Sherman Act.

B. ***Statement of Facts***

"Actors' Equity has collective bargaining agreements with most major theatrical producers in New York and elsewhere, with most off-Broadway producers, and with many other theatrical producers throughout the United States. The terms negotiated with various producers groups are the minimum terms and conditions of employment. An actor is free to negotiate salary or terms more favorable than those prescribed in the collective bargaining agreement, but neither the actor nor the producer [nor the agent] is permitted to diminish the wages set forth in the relevant collective bargaining agreement.

Theatrical agents are independent contractors in the business of placing their actor clients in jobs with producers. Theatrical agents receive commissions, based on a percentage of earnings of the client, only if they succeed in obtaining employment for their clients.

Theatrical agents who operate in New York City [including all petitioners] are required to be licensed as employment agencies and are regulated by the Department of Consumer Affairs of New York City pursuant to Article 11 of the General Business Law of the State of New York, which sets the maximum commissions [10%] employment agencies may charge and has specific provisions[1] dealing with theatrical agents." (478 F.Supp. at 497, B2)

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[1] *See* §§180, 183 and 185 (Appendix G).

"At issue in this case is Equity's system of 'franchising' theatrical agents. Agents pay a fee and agree to abide by certain restrictions in return for certification as 'franchised' agents. Equity encourages agents to become franchised by forbidding its members to deal with unfranchised agents. Equity members who negotiate contracts using the services of unfranchised agents are subject to union discipline, including fines." (1980-2 CCH Trade Reg. Rep. at page 75,905, A1)

"In order to enforce its rule that members deal only through franchised agents, Actors' Equity has advised members that they could be disciplined for dealing with nonfranchised agents. It was Actors' Equity's practice to send a letter to an actor dealing with a nonfranchised agent, warning the actor that he could be disciplined—a copy of the letter was also sent to the nonfranchised agent. In 1979, Actors' Equity began disciplinary proceedings against members who were dealing with nonfranchised agents [such as petitioners]—members who would not agree to cease dealing with nonfranchised agents were fined after hearings." (478 F.Supp. at 499, B4)

"The most important of the restrictions placed upon franchised agents is the requirement that they renounce any right to take commissions on contracts under which an actor receives scale wages. Scale wages are set by a collective bargaining agreement between Equity and theatrical producers, to which the agents are not parties. To the extent that a contract includes provisions under which an actor will sometimes receive scale pay (as for rehearsal periods and 'chorus' employment) and sometimes more, the franchise regulations deny the agent any commission on the scale portions of the contract. Franchised agents are also precluded from taking commissions on certain expense

money paid to union members; commissions are limited on wages within 10% of scale pay; and agents must allow actors to terminate a representation contract if the agent is unsuccessful in procuring employment for the actor within a specified period of time." (1980-2 Trade Reg. Rep. at pages 75,905-6, A1-2)

Prior to October, 1977, Equity's franchising rules prohibited agents from charging commissions on most "scale" jobs. Thus, agents would receive no compensation if they obtained a job for an actor which paid the minimum or scale salary provided for in the collective bargaining agreements between Equity and the producers. In addition, Equity prohibited commissions on rehearsal pay, on pay for out of town expenses, and on "chorus" jobs. Moreover, the Union could unilaterally reclassify non-chorus jobs as chorus jobs.

In addition, agents are required to pay franchise fees to Equity. These fees are deposited by Equity in its general treasury and Equity makes no attempt to cost justify the amounts it charges as franchise fees. The franchise fees:

". . . are not segregated from other union funds. While the union argues that they are necessary to pay the union's expenses in administering the franchise system, no evidence was presented at trial to show that the union's costs justified the franchise fees." (1980-2 Trade Reg. Rep. at page 75,908, A4)

In October, 1977, Equity promulgated new Equity Agency Regulations. The new Equity Agency Regulations, *inter alia,* prohibit commissions on: all scale jobs, on chorus jobs, on rehearsal pay, and on out-of-town expense money. *In fact, the new regulations eliminated those limited areas in which commissions on scale were previously allowed* and, further, doubled the franchise fees. Due to their dissatis-

faction with the then proposed new Equity Agency Regulations, the Agents advised the Union that they "cannot in good conscience accept" the proposed new regulations. As a result, most of the Agents have remained unfranchised. Because of continuing pressure brought by the Union upon the Agents and their actor-clients (Union members who employ petitioners), the petitioners commenced this action in May, 1978 for injunctive relief only.

C. *Proceedings Below*

The complaint and the Agents' motion for a preliminary injunction prohibiting the Union and its members from boycotting the Agents during the pendency of this action were filed on May 26, 1978. The court below denied the motion for a preliminary injunction [Appendix D]. The Court of Appeals, in a memorandum opinion, affirmed [Appendix C]. The bench trial of the action commenced on June 21, 1979. On October 24, 1979, Judge Motley rendered her decision [Appendix B] dismissing the complaint. On May 23, 1980, in an opinion written by Judge Lumbard [Appendix A], the Court of Appeals affirmed.

Reasons For Granting the Writ

The decisions below should be reversed not merely because they are wrong—but because in this day and age they permit unions under the guise of compulsory franchising and licensing systems to absolutely and arbitrarily dominate, regulate and monopolize the business lives and careers of independent contractors who, as employment agencies, have their commissions and other facets of their business regulated by a state agency. These independent contractors are agents who are employed by and render services to union members, but are not union members and do not receive any union benefits.

In addition to Equity, many other talent unions such as American Federation of Musicians, Screen Actors Guild ("SAG"), American Federation of Television and Radio Artists ("AFTRA"), and the Writers Guild of America have compulsory franchising systems. As noted at page 9 of Equity's brief to the Court of Appeals, "Equity is only one of many talent unions which regulates talent agents." The importance to unions of this issue is underscored by the *amicus curiae* participation below of SAG and AFTRA who, with Equity, are affiliates of the AFL-CIO.

If the decisions below are allowed to stand, the delicate balance between conflicting federal labor and antitrust policies will be upset to the detriment of sound antitrust policy with no countervailing benefit to labor. In *Jou-Jou Designs Inc.* v. *ILGWU,* 1980-2 Trade Reg. Rep. ¶63,402 (S.D.N.Y.) at page 76,047, the court noted:

> "We are thus confronted, as many courts have been, with the interaction of antitrust policy and labor policy, expressed in statutes and Supreme Court decision. The accommodation between these policies, characterized by one commentator as 'intrinsically incompatible', presents 'a troublesome and unruly issue.' Commerce Tankers v. National Maritime Union of America, 553 F.2d 793, 801 (2d Cir. 1977), quoting Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws,* 32 U. Chi. L. Rev. 659 (1965)."

In "Consolidated Express: Antitrust Liability for Illegal Labor Activities," 80 Columbia L. Rev. 644 (April 1980), the author stated at page 644:

> "Courts have struggled for decades to resolve the clash between the procompetitive purposes of the antitrust laws and the anticompetitive impact of the labor laws."

In this regard, it should be noted that in most cases involving conflicts between federal labor and antitrust policies, the courts are concerned with the "congressional policy favoring collective bargaining" [*see, e.g., Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 622 (1975); *Local Union No. 189, Amalgamated Meat Cutters & Butchers Workmen of North America AFL-CIO* v. *Jewel Tea Inc.,* 381 U.S. 676 (1965)], a concern which is not present here. If Equity is precluded from franchising agents, its collective bargaining agreements with producers will not be affected and the policies of economic freedom which support the antitrust laws will be furthered.

Stripped of the immunity provided by the holding below that agents are part of the labor group, the Union's franchising system violates the Sherman Act because:

A. it constitutes a group boycott which totally prevents the Agents from serving as agents for actors and forecloses them from competing with Union-franchised agents. *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.,* 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway Hale Stores, Inc.,* 359 U.S. 207 (1959);

B. its regulation of agents' commissions constitutes both horizontal and vertical price fixing. *Albrecht* v. *The Herald Co.,* 390 U.S. 145 (1968); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.,* 220 U.S. 373 (1911); *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975), *rehearing denied,* 423 U.S. 886 (1975);

C. it constitutes an agreement not to compete by horizontal competitors. *Interstate Circuit, Inc.* v. *U.S.,* 306 U.S. 208 (1939); *United States* v. *General Dyestuff Corporation,* 57 F.Supp. 642 (S.D.N.Y. 1944); *Duplan*

Corp. v. *Deering Milliken, Inc.*, 444 F.Supp. 648, 683-684 (D.S.C. 1977); and

D. it permits the Union to use its legal monopoly over the services of actors to illegally monopolize the business of rendering agency services to actors. *See Packaged Programs Inc.* v. *Westinghouse Broadcast Co., Inc.*, 255 F.2d 708, 710 (3rd Cir. 1958), and cases cited therein.

I.

The Courts Below Improperly Interpreted and Extended This Court's Decision in *Carroll*.

In holding that Agents were part of the Union's labor group, the courts below relied primarily on this Court's decision in *Carroll*. That reliance was error and improperly extended the *Carroll* holding which applied only to booking agents in the unique club date field to theatrical agents who operate under vastly different conditions.

The most unusual circumstance in *Carroll*, which makes it so different from the subject case, is the fact that *the union in Carroll, the American Federation of Musicians ("AFM"), did not have a collective bargaining agreement with the employers of its members* in the peculiar club date field. There were no collective bargaining agreements because of the unique nature of the diverse employers who employed club date musicians sporadically, sometimes only once in a lifetime and generally for non-business purposes, *e.g.*, the father of the bride. This is a rare situation since the primary purpose of unions is to negotiate collective bargaining agreements with the employers of its members, setting forth the minimum wage scales and working conditions of the Union's members. This should be contrasted

with the case at bar where the employers (theatrical producers) have formed associations for the sole purpose of negotiating collective bargaining agreements with Equity. Thus, unlike AFM, Equity has collective bargaining agreements with all producers who employ its members.

The uniqueness and peculiar facts of *Carroll* have not escaped the attention of commentators[2] or the courts. In *Home Box Office, Inc.* v. *Director's Guild of America, Inc.*, 83 F.R.D. 423, 425 (S.D.N.Y. 1979), the court, commenting upon defendants' reliance upon *Carroll*, noted:

> "But *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1968), cannot confidently be read so broadly, given its special circumstances, especially the fact that the orchestra leaders there actually played as musicians with their dance bands. Furthermore, this Court, at least, lacks the confidence to apply a decision as unique and difficult as *Carroll* without the benefit of a full record, as Judge Levet insisted on having in *Carroll* itself."

In his dissent in *Carroll*, Justice White referred to "the peculiar role of bandleaders and the peculiar economics of the club-date music industry." 391 U.S. at 114.

At best, *Carroll* dealt only tangentially with the issue of union regulation of agents. In *Carroll*, the four plaintiffs were orchestra leaders and musicians who were members of AFM while competing with and hiring union member-musicians. Two of the four *Carroll* plaintiffs were also

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[2] *E.g.*, Bartosic, *The Supreme Court, 1974, Term*, 62 Va. L. Rev. 533, 593 n. 270 (1976); Case Notes, *Labor Law-Antitrust Liability of Labor Unions*, 15 B.C. Ind. Comm. L. Rev. 595, 606 (1974) ("it has been suggested that the holding in *Carroll* may be limited to the special employment conditions of the music industry"); and DiCola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. Pitt. L. Rev. 705, 747 (1972).

agents, but only to the limited extent that they booked jobs for their own orchestras. Accordingly, the primary issue and the focus in *Carroll* was plaintiffs' activities as orchestra leaders and not as booking agents. This is demonstrated by the Supreme Court's delineation of the issue in *Carroll*:

> "The question is whether union practices of the petitioners *affecting orchestra leaders* violate the Sherman Act as activities in combination with a 'non-labor' group, or are exempted by the Norris-LaGuardia Act as activities affecting a 'labor' group which is a party to a 'labor dispute' ". 391 U.S. at 101 (italics supplied).

In its opinion below, the Court of Appeals recognized that "the central holding" in *Carroll* "was that the fact that bandleaders sometimes performed as musicians meant that such [union] restrictions were valid. . . ." (1980-2 Trade Reg. Rep. at page 75,907, A3)

Despite the peripheral involvement of unlicensed part-time agents in *Carroll,* that decision has been indiscriminately extended to cases[3] which involved full time professional independent agents, a factual situation never considered in *Carroll.*

In *Carroll,* the Supreme Court approved the District Court's holding that the orchestra leader plaintiffs were parties to a "labor dispute" and were a "labor group" because of the "presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." 391 U.S. at 106. The holding that there was an "economic interrelationship" between the members of AFM and its booking agents and the reasonable relation-

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[3] *See e.g., Adams Ray & Rosenberg* v. *William Morris Agency,* 411 F. Supp. 403 (C.D. Ca. 1976); and *Redfield* v. *AFM,* 603 F.2d 214 (2d Cir. 1979).

ship between the licensing of agents and AFM's "interest in maintaining observance of union scale wages and working conditions" was predicated upon the following findings of facts, *none of which are present in the instant case:*

1. In *Carroll,* the AFM did not have a collective bargaining agreement with the employers (*e.g.,* the father of the bride) who hired its members. Accordingly, if AFM were to enforce its unilaterally imposed minimum wage scales, it had to do so through its members and through direct vertical regulation of the booking agents. Here, where the Union has entered into collective bargaining agreements with the employers (producers) who directly pay Union members, there is no such need or justification.

2. In *Carroll,* where there was no collective bargaining agreement between the Union and the employers, this Court held that AFM's fixing the minimum prices which orchestra leaders could charge was justified by a specific "finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader." 391 U.S. at 112.

> "There was evidence that when the leader does not collect from the purchaser of the music [employer] an amount sufficient to make up the total of his out-of-pocket expenses, including the sum of his wage-scale wages and the scale wages of the sidemen, he will, in fact, not pay the sidemen the prescribed scale." *Id.* at 111.

In stark contrast, the courts below could not, and indeed did not, find that Union members were not paid scale wages or were in danger of not being paid scale wages. There was undisputed evidence that:

> A. producers must pay scale wages to Union members pursuant to collective bargaining agreements between the Union and producers;

B. producers must post a bond guaranteeing the payment of scale wages to Union members; and

C. unlike *Carroll,* where the employers paid the booking agents who in turn paid the union members, *here the producers pay the actors directly.* Despite Union allegations that actors needed protection from their agents, *there is no evidence that any Union member who used an agent was ever paid less than scale or minimum.*

In view of the above, the District Court's holding that the "franchising of agents . . . operate[s] to protect wage scales" (478 F.Supp. at 504, B9) is without substantiation and is clearly erroneous.

3. In *Carroll,* there was a specific finding:

"that the booking agent regulations were adopted because of experience that [A] many booking agents charged exorbitant fees to members and [B] booked engagements for musicians at wages which were below union scale.'" *Id.* at 113.

Again for the reasons noted in "2", *supra,* the court below did not find that the petitioners or other agents "booked engagements for" Union members "at wages which were below union scale". Similarly, the court below did not find that "many" theatrical "agents (or even one) charged exorbitant fees to" Union members, because there is no evidence that:

A. any petitioner or any other agent charged an exorbitant commission[4] to any Union member or anyone else; or

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[4] Since the booking agents were allowed to charge 15% commissions in *Carroll* (241 F. Supp. at 881), by using the term "exorbitant" the Court was obviously referring to commissions in excess of 15%.

B. any Agent charged a Union member a commission in excess of the 10% commission permitted by Article 11 of the General Business Law.

Because of the above, the Court of Appeals holding that the regulation of theatrical agents is justified by the *"possibility* that job-hungry actors will work through agents who take excessive commissions" (1980-2 Trade Reg. Rep. at page 75,908, A4) (emphasis supplied), can only be characterized as speculative and therefore is clearly erroneous.

4. In *Carroll,* the booking agents were not licensed nor were their commissions or any other facet of their business regulated by any government agency. Therefore, the vertical licensing of unregulated agents upheld in *Carroll* reflected a proper balance between the conflicting interests of federal labor and antitrust policies. Here, where theatrical agents are already regulated, a franchising system such as Equity's does not protect or further any legitimate union interest and contravenes established antitrust policy.

II.

Carroll, as Applied to Agents, Should Be Overruled.

If this Court finds that the courts below have properly extended the *Carroll* holding in the unique club date field to theatrical agents, thereby seriously upsetting the judicial balance between conflicting antitrust and labor policies, then *Carroll* should be overruled as it applies to agents to restore this balance. The following quotations from Justice White's dissent in *Carroll* are particularly appropriate today in view of the decisions below:

"In my view the Court is misled by the peculiar role of bandleaders and the peculiar economics of the club date

music industry, and fashions a rule which, if comprehensible at all, has unfortunate consequences for the delicate and difficult area of conflict between antitrust and labor policy." (391 U.S. at 114).

"It may be that the Court views this industry as having special problems of supply and demand requiring special treatment under the antitrust laws. If this is the case, the Court should frankly say so and seek to confine the misguided rules of law it announces." (391 U.S. at 121).

III.

The Courts Below Improperly Extended *Carroll* to Permit Unions to Require Agents to Work For Nothing.

If this Court were to affirm that portion of the opinions below which justify the "regulation of the fees of agents" on the ground that "the union cannot eliminate wage competition among its members without" such regulation (1980-2 Trade Reg. Rep. at page 75,907, A3), it should nevertheless grant certiorari for the purpose of holding that the regulation of maximum fees does not permit unions to require agents to render their services to union members for nothing on scale or minimum or any other jobs.[5] No citation is required for the proposition that the power to tax is the power to destroy. Agents are forced to work for nothing when they obtain a scale job for a client even though they sought a higher wage for the client in negotiations with the producer. In view of agents' self-interest in obtaining the highest possible wages for actor-clients, there can be no justification for the Union's prohibition of com-

[5] In some circumstances scale or minimum wage may be as high as $600 per week.

missions on scale jobs. Moreover, agents' commissions are regulated by Article 11 of the General Business Law and there is no evidence that agents collect commissions which violate Article 11. Accordingly, no justification has been shown to substitute the Union's desire to impose onerous and self-serving restrictions on agents' commissions for the wisdom of the New York State Legislature in permitting theatrical agents to charge a ten percent commission under Article 11 of the General Business Law.

If the courts below are upheld, the Union might, and could lawfully the day after this Court's decision, require agents to work for no commission on jobs which pay $1000 a week or more. Where, as here, agents are forced to work for nothing, the Union is not protecting its members from agents but instead is requiring agents to subsidize Union members.

IV.

The Courts Below Improperly Extended *Carroll* to Permit Unions to Extract Franchise Fees From Compulsorily Franchised Agents For the Privilege of Being Regulated and Dominated by the Union.

Not content with regulating the commissions that agents charge Union members and with regulating the manner in which agents may operate their business, the Union requires agents to pay franchise fees for the privilege of being regulated, dominated and required to work for nothing. *No court, not even Carroll, prior to the decisions of the court below, has ever held that a union may extract franchise fees from independent agents who represent union members.* In *Carroll*, the union did not extract franchise fees from the agents it regulated. 241 F.Supp. at 881.

The Court of Appeals, while recognizing that franchise fees is a "troublesome" area, appears to have assumed without explanation that the Union may impose upon agents the "union's expenses in administering the franchising system" it forces upon unwilling agents. 1980-2 Trade Reg. Rep. at 75,908, A4. (1980-2 Trade Reg. Rep. at page 75,907, A3), it should

The Union's requirement that agents must pay a franchise fee in order to represent actor-members of the Union on the Union's terms and conditions does not constitute protection of wage scales—but again amounts to the agents' forced subsidization of Union members. The more franchise fees extracted from agents, the less dues Union members must pay to Equity. If Equity (like the AFM in *Carroll*) did not charge any franchise fees, the wage scales Equity negotiates with producers for the benefits of Equity's members would remain unchanged. Accordingly, there is no basis for Judge Motley's "opinion that the franchise fees are reasonably related to the operation of the franchise system and the system's protection of wage scales and working conditions." 478 F.Supp. at 504, B9.

CONCLUSION

If the decisions below are allowed to stand, agents will be permanent members of unions' "labor group" and thus subject to union domination and regulation without the protection of the antitrust laws or the benefits of union membership and will be compelled to pay a franchise fee to remain in this unfortunate condition.

Dated: New York, New York
August 19, 1980

Respectfully submitted,

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APPENDIX

APPENDIX A
DECISION OF SECOND CIRCUIT AFFIRMING DISRICT COURT'S DECISION TO DISMISS THE COMPLAINT.

[¶ 63,376] H. A. Artists & Associates, Inc., et al. v. Actors Equity Association and Donald Grody.

U. S. Court of Appeals, Second Circuit. Docket No. 79-7821. No. 875, September Term, 1979. Decided May 23, 1980. Appeal from dismissal of a complaint by theatrical agents against actors' union, alleging antitrust violations. 478 F. Supp. 496 (S. D. N. Y. 1979) (Motley, J.), affirmed.

Sherman Act

Labor Unions—Antitrust Immunity—System of Franchising Theatrical Agents—Combination with Non-Labor Group.—An actors union's system of franchising theatrical agents whereby agents paid a fee and agreed to abide by restrictions in return for certification as franchised agents was immune from antitrust scrutiny under the statutory labor law exemption. Collective bargaining agreements did not reveal any combination between the union and theatrical producers, a "non-labor group", that would divest the union's franchise system of the protection of the statutory exemption. Unilateral statements made by the union that only franchised agents may negotiate employment for performers were not proof of an agreement because they only meant that union members were forbidden from dealing with unfranchised agents; there was no indication that producers agreed to cooperate or that they accepted the union's view. Any combination between the union and agents who agreed to become franchised did not have any effect as to the exemption because those agents were a "labor group". Moreover, the goal pursued by the franchising system through agent restrictions—mainly a non-charge of commission on scale wage contracts—was the protection of a minimum wage in the industry which was within the area of the union's legitimate self-interest. See ¶ 5415, 5435.

For plaintiffs-appellants: Howard Breindel, Worcester, Mass. (Bowditch & Dewey, Worcester, Mass., Solin & Breindel, New York, N. Y., of counsel). **For defendants-appellees:** Nan Bases, New York, N. Y. (Cohn, Glickstein, Lurie, Ostrin, Lubell & Lubell, New York, N. Y., of counsel). For amicus curiae: Shea & Gould, New York, N. Y., for Screen Actors Guild, Inc.; Mortimer Becker, New York, N. Y. (Van Arkel, Kaiser, Gressman, Rosenberg and Driesen, Washington, D. C., of counsel), for American Federation of Television and Radio Artists.

Before: LUMBARD, MANSFIELD, Circuit Judges and BARTELS, District Judge.*

[Opinion]

LUMBARD, Cir. J.: Appellants, theatrical agents who act as intermediaries between actors and producers, appeal from a judgment of the District Court for the Southern District of New York, 478 F. Supp. 496 (1979) (Motley, J.), holding certain practices of defendant union Actors Equity ("Equity") immune from challenge under the antitrust laws because protected by the "statutory labor exemption." We affirm.

[System of Franchising Theatrical Agents]

At issue in this case is Equity's system of "franchising" theatrical agents. Agents pay a fee and agree to abide by certain restrictions in return for certification as "franchised" agents. Equity encourages agents to become franchised by forbidding its members to deal with unfranchised agents. Equity members who negotiate contracts using the services of unfranchised agents are subject to union discipline, including fines.

[Agent Restrictions]

The most important of the restrictions placed upon franchised agents is the requirement that they renounce any right to take commissions on contracts under which an actor receives scale wages. Scale wages are set by a collective bargaining agreement between Equity and theatrical producers, to which the agents are not parties. To the extent that a contract includes provisions under which an actor will sometimes receive scale pay (as for rehearsal periods and "chorus" employment) and sometimes more, the franchise regulations deny the agent any commission on the scale portions of the contract. Franchised agents are also precluded from taking commissions on certain expense money paid to union members; commissions are limited on wages within 10% of scale pay; and

* Hon. John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

agents must allow actors to terminate a representation contract if the agent is unsuccessful in procuring employment for the actor within a specified period of time.

Some theatrical agents find this system acceptable, and this group—which has formed a trade association called TARA—is not a party in this litigation.

The district court did not reach the question of whether or not the franchise system is an unreasonable restraint of trade, or constitutes *per se* illegal price-fixing, because it found that the union's actions in creating and maintaining the franchise system were fully protected by the "statutory" labor exemption from the antitrust laws, which removes from antitrust scrutiny unilateral action by a labor union pursuing the interests of its members. The "statutory" exemption has its source in judicial readings of sections 6 and 20 of the Clayton Act, 15 U. S. C. §§ 17, 29, and of the Norris-LaGuardia Act, 29 U. S. C. §§ 105-115. Under the leading "statutory" labor exemption case of *United States v. Hutcheson* [1940-1943 TRADE CASES ¶ 56,091], 312 U. S. 219 (1941), the threshold issue is whether or not Equity's franchising of agents has involved any combination between Equity and any "non-labor groups" or persons who are not "parties to a labor dispute." *Id.* at 232. If it has, the protection of the exemption does not apply.[1]

[Combination with Non-Labor Group]

Most employers qualify as a "non-labor group,"[2] and the court below considered whether or not there was any agreement, either explicit or tacit, between Equity and the producers to establish or police the franchise system. We do not believe the district court was clearly erroneous in finding that the collective bargaining agreement does not reveal any combination between Equity and the producers with respect to agents, Fed. R. Civ. P. 52(a), *Meat Cutters v. Jewel Tea Co.* [1965 TRADE CASES ¶ 71,463], 381 U. S. 676, 694 (1965).

Appellants argue that the provision in the collective bargaining agreement that standard employment contracts include a space for the actor's agent's name, and another provision of the agreement that requires this line to be filled in, is evidence that the producers agree with Equity to help the union police its franchise system. We disagree. As the district court found, there was evidence that contracts were often executed leaving blank the line left for the agent's name, and that, even so, Equity honored such contracts and did not take any action against members who worked under such contracts. The provision requiring that every line be filled in far antedated the appearance of the line for "name of agent." The district court was not clearly erroneous in concluding that Equity did not in fact require that this line be filled in.

The collective bargaining agreement aside, appellants argue that various statements made by Equity officials to union members and to producers are evidence of a combination between Equity and the producers with regard to agent franchising. We have examined each of the statements in the record adduced to support this point and we conclude that the district court's finding that they do not demonstrate any such combination cannot be labeled clearly erroneous. Unilateral pronouncements by Equity such as that "only franchised agents may negotiate employment deals for Equity performers" are not proof of an agreement because they may mean no more than that Equity members are forbidden from dealing with unfranchised agents. Such a prohibition, of course, since it serves the union's self-interest in a matter of proper union concern and does not involve a non-labor group, is safe from antitrust scrutiny under the statutory exemption. *United States v. Hutcheson, supra.*

There is some evidence in the record that Equity sought the producers' cooperation in enforcing the franchise system during the 1975 negotiations between Equity, TARA and the producers. And Equity officials did tell their membership that producers had an "obligation" to avoid using unfranchised agents. But such unilateral expressions, in the absence of any indication from the producers that they had agreed to cooperate or that they had accepted Equity's view of their "obligations," is not

[1] If a court finds that there has been an agreement between a union and a "non-labor group", the agreement may still be entitled to antitrust immunity under the "non-statutory" exemption. *Connell Construction Co. v. Plumbers Local 100* [1975-1 TRADE CASES ¶ 60,341], 421 U. S. 616, 622 (1975). Since both the "statutory" and "non-statutory" exemptions are based on judicial readings of the Sherman, Clayton and Norris-LaGuardia Acts, this choice of terminology seems unfortunate. See I Areeda & Turner, *Antitrust* (1978) § 229 at 192.

[2] An exception is an employer in job competition with his employees, e. g., a bandleader who sometimes both leads a band and plays an instrument. *American Federation of Musicians v. Carroll* [1968 TRADE CASES ¶ 72,456], 391 U. S. 99 (1967).

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evidence from which the court was required to find that a "combination" had been formed. Our conclusion is also based on the fact that there was no evidence at trial that any producer had considered himself bound by the union's statements; nor did any producer testify that he had been pressured not to deal with unfranchised agents, or that he had reported unfranchised agents to the union.

[Franchised Agents as Labor Group]

But on the record in this case we discern a combination between the union and individuals who appear as if they might be members of a "non-labor" group. These individuals are those agents who have agreed with the union to become franchised, and these agreements must be scrutinized to determine if they are agreements that would divest Equity's franchise system of the protection of the "statutory" exemption. In our view, they do not because the agents involved are a "labor group."

In *American Federation of Musicians v. Carroll* [1968 TRADE CASES ¶72,456], 391 U. S. 99 (1967), the Supreme Court identified the test for distinguishing a labor group from a non-labor group as ". . . the presence of job or wage competition or some other economic inter-relationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed, the independent contractors were a 'labor group' . . . " 391 U. S. at 106, quoting [1965 TRADE CASES ¶71,546], 241 F. Supp. at 887. The above language is taken from the *Carroll* court's discussion of whether or not bandleaders in the "club date" field could be subjected to certain forms of union restrictions. Since the central holding in the case was that the fact that bandleaders sometimes performed as musicians meant that such restrictions were valid, most of the opinion deals with the "job or wage competition" branch of the disjunctive test quoted above. But the *Carroll* court also approved the musicians' union's restrictions on booking agents' commissions, which were enforced through a "licensing" system analogous to the "franchising" system at issue in the case at bar. 391 U. S. at 116-17.

Unlike the bandleaders, the agents in *Carroll* were not in any kind of "job or wage competition" with union members. The court's *sub silentio* application of the statutory exemption therefore supports the view that the musicians and the booking agents were in a sufficient "economic interrelationship" to justify union regulation. Because of the vagueness of this term, however, we believe the matter calls for further explanation.

Most unions are in an "economic interrelationship" with the employers of their membership. When the union gains a wage increase, the employers give up corresponding amounts of money (though not necessarily corresponding profits, because labor costs can often be passed along to consumers). But such an "economic interrelationship" does not suffice to make an employer a "labor group", or even a "party to a labor dispute"; otherwise there would be no need for the "non-statutory" exemption, which was developed largely to provide an exemption for union agreements with employers. *Connell Construction Co. v. Plumbers Local 100* [1975-1 TRADE CASES ¶60,341], 421 U. S. 616, 622 (1975). To choose a different example, there is an "economic interrelationship" between a labor union and the buyers of goods produced by the union members' employer. If, for example, steelworkers were to win a wage raise of enormous size, various users of steel products, such as automobile manufacturers, would be adversely affected. Yet a combination between the steelworkers and an automobile manufacturer would not be entitled to the benefit of the statutory exemption because of this "economic interrelationship."

For purposes of this case, it is enough to note that the "economic interrelationship" test has never been used to immunize from antitrust challenge anything more than a union's effort to regulate parties, who, because of industry structure, stand athwart the current of wages paid by employers to union members; and that these efforts have been associated with attempts to defend the integrity of *minimum* wages. See, e. g., *Adams, Ray & Rosenberg v. William Morris Agency*, 411 F. Supp. 403 (C. D. Cal. 1976). In industries where it is necessary or customary for union members to secure employment through agents, and agents' fees are calculated as a percentage of wages set by a collective bargaining agreement, such agents must be considered a "labor group" because the union cannot eliminate wage competition among its members without regulation of the fees of the agents.

[Legitimate Labor Goal]

Once it is determined that the union's actions have involved no combination with

a non-labor group, it remains, under *United States v. Hutcheson, supra*, only to decide if the goal being pursued in within the area of the union's legitimate self-interest. In the case at bar, Equity, through its franchising system, seeks primarily to protect from encroachment a minimum wage in an industry where the maintenance of a minimum wage poses problems of particular intractability. The possibility that job-hungry actors will work through agents who take excessive commissions is a matter of legitimate union concern. The goal of the agent restrictions is the elimination of wage competition, traditionally one of the most sacrosanct goals of national labor policy.

To this point, we have been concerned with the core of Equity's franchising system —the securing by the union of an agreement from the agents not to charge commissions on certain types of work obtained. A second aspect of the franchising system, under which the union charges a fee to agents who become franchised, is more troublesome. These fees ($200 for the initial franchise; $60 per year thereafter for each agent, and $40 for any sub-agent working in the office of another), are not segregated from other union funds. While the union argues that they are necessary to pay the union's expenses in administering the franchise system, no evidence was presented at trial to show that the union's costs justified the franchise fees.

Clearly the union could not, legally, exact more from the agents than it needs to offset the costs of the franchising system. Such exactions would be unconnected with any of the goals of national labor policy which justify the antitrust exemption for labor. Nevertheless, this case in its present posture can best be disposed of by approving the fees as they stand today. There was testimony that at least one full-time Equity employee was engaged in updating lists of franchised agents and correlating contracts with these lists. There was also testimony that approximately 200 theatrical agents or agencies are affected by the union practices under challenge. Assuming an average yearly charge of $60, Equity's franchising revenues would amount to approximately $12,000. Such a sum, plus initial franchise fees collected during the year, cannot be incommensurate with Equity's expenses in maintaining a full-time employee to administer the system. In such circumstances, a remand to the district court would not serve any useful purpose.

Affirmed.

APPENDIX B
DISTRICT COURT OPINION DISMISSING THE COMPLAINT

H. A. ARTISTS & ASSOCIATES, INC., S. T. E. Representation, Ltd., Don Buchwald & Associates, Inc., Marje Fields, Inc., Henderson/Hogan Agency, Inc., Joel Pitt, Ltd., Talent Representatives, Inc., D. M. L. Talent Associates, Ltd., Jean Thomas Agency, Inc., Bob Waters, Inc., William D. Cunningham & Associates, Inc., Tatrum, Robertson & Hughes, Inc., Monty Silver Agency, Inc., Lester Lewis Associates, Inc., Leaverton Associates, Ltd., Joe Jordan Talent Agency, Inc., Raglyn-Shamsky, Ltd., Ann Wright Representatives, Inc., Plaintiffs,

v.

ACTORS' EQUITY ASSOCIATION, an unincorporated association and Donald Grody, Defendants.

No. 78 Civ. 2452.

United States District Court, S. D. New York.

Oct. 24, 1979.

Employment agencies operating as theatrical agents brought suit against a labor organization representing actors working in the legitimate theater, contending that the

2. This is not the situation which the Supreme Court addressed in *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978), and that case is therefore inapposite.

labor organization's franchising system and collective bargaining agreements violated the Sherman Anti-Trust Act. The District Court, Motley, J., held that the conduct in question was protected under a statutory exemption to the antitrust laws applying to union activities.

Complaint dismissed.

Monopolies ⇐12(8)

Where, in adopting franchising system and collective bargaining agreements, labor organization representing actors working in legitimate theater acted in its own self-interest concerning matters intimately bound with wage scales and working conditions, and acted without conspiring or combining with any nonlabor group, such activities were protected by statutory exemption from antitrust laws for union activities. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, § 6, 15 U.S.C.A. § 17; § 20, 29 U.S.C.A. § 52; Norris-LaGuardia Act, §§ 1–15, 29 U.S.C.A. §§ 101–115; General Business Law N.Y. § 170 et seq.

Solin & Breindel by Howard Breindel, Frederick Gold, New York City and Bowditch & Dewey by Charles Donelan, Worcester, Mass., for plaintiffs.

Cohn, Glickstein, Lurie, Ostrin & Lubell by Nan C. Bases, Mary K. O'Melveny, New York City, for defendants.

FINDINGS OF FACT

MOTLEY, District Judge.

Defendant Actors' Equity Association ("Actors' Equity") is a labor organization representing actors working in the legitimate theatre. Defendant Donald Grody ("Grody"), as Executive Secretary, is the chief executive officer of Actors' Equity. The plaintiffs are employment agencies located in New York City who operate as theatrical agents.

Actors' Equity has collective bargain agreements with most major theatrical producers in New York and elsewhere, with most off-Broadway producers, and with many other theatrical producers throughout the United States. The terms negotiated with various producer groups are the minimum terms and conditions of employment. An actor is free to negotiate salary or terms more favorable than those prescribed in the collective bargaining agreement, but neither the actor nor the producer is permitted to diminish the wages set forth in the relevant collective bargaining agreement.

Theatrical agents are independent contractors in the business of placing their actor clients in jobs with producers. Theatrical agents receive commissions, based on a percentage of earnings of the client, only if they succeed in obtaining employment for their clients.

Theatrical agents who operate in New York City are required to be licensed as employment agencies and are regulated by the Department of Consumer Affairs of New York City pursuant to Article 11 of the General Business Law of the State of New York, which sets the maximum commissions employment agencies may charge and has specific provisions dealing with theatrical agents.

As a matter of general industry practice, producers seek actors and actresses for their productions through agents. Testimony in this case convincingly established that an actor without an agent does not have the same access to producers or the same opportunity to be seriously considered for a part as does an actor who has an agent. Even principal interviews, in which producers are required to interview all actors who want to be considered for principal roles, do not eliminate the need for an agent, who may have a greater chance of gaining an audition for his client.

Under Actors' Equity agency regulation system, agents are required to secure licenses, also known as permits or franchises, from Actors' Equity in order to represent Actors' Equity members. Licensed agents must abide by a schedule of maximum commissions established by Actors' Equity and must adhere to other rules designed to pro-

tect Actors' Equity members. Actors' Equity members are forbidden from dealing through agents who are not licensed by Actors' Equity, and members are subject to discipline for dealing with nonfranchised agents.

Theatrical Artists Representatives Association ("TARA") is a trade association of agents working in the legitimate theatre field. Discussions between Actors' Equity and TARA have resulted in several revisions in Actors' Equity regulations over the years. While holding an Actors' Equity franchise is a condition of membership in TARA, membership in TARA is not a condition to obtaining an Actors' Equity franchise.

Discussions between Actors' Equity and TARA in the 1950's resulted in the promulgation by Actors' Equity of "Rule A," which governed relations between Actors' Equity members and theatrical agents between 1958 and 1977. Rule A prescribed the minimum terms of contracts between actors and agents, including the maximum commissions which could be charged, the maximum duration for exclusive contracts, and the conditions warranting release from an exclusive contract. Rule A also established procedures for the granting of franchises, the discipline of agents, and the arbitration of disputes under the agency regulations.

The current Actors' Equity agency regulations also resulted from discussions between Actors' Equity and TARA. The course of these discussions and related events follows.

Discussions between Actors' Equity and representatives of TARA commenced in or about 1975. In the course of the discussions, TARA gave six months notice to "terminate" Rule A; this termination date was extended several times by mutual consent.

A major subject of the discussions was Rule A's provision prohibiting agents from charging commissions on jobs paying the minimum scale salary provided for in the collective bargaining agreements between Actors' Equity and the producers. In addition, Rule A prohibited commissions on rehearsal pay, on pay for out of town expenses, and on "chorus" jobs. TARA demanded "10% from the first dollar," that is, a 10% commission on all monies received by the actor, regardless of whether the actor's salary exceeded the minimum scale. When Actors' Equity submitted to TARA a proposal that, while increasing commissions, did not meet this demand, TARA rejected the proposal and officially terminated Rule A on January 6, 1977. Agents who "resigned" their franchises pursuant to TARA's termination of Rule A were not permitted to represent Actors' Equity members except under pre-existing agency contracts. Rule A remained in effect for those agents who agreed to abide by it—these agents were permitted to represent Actors' Equity members for all purposes.

As negotiations continued, Actors' Equity drafted a revised commission schedule and new agency regulations, known as the "Equity Agency Regulations." These regulations provided that an agent could charge a 10% commission, so long as that commission did not invade the negotiated minimum, that an agent could charge a commission on off-Broadway contracts, and that expense money negotiated by Actors' Equity was not commissionable.

In May, 1977, seven agents, including five who are plaintiffs herein, filed a lawsuit in the United States District Court for the Southern District of New York, challenging Actors' Equity's franchising system under the antitrust laws (*Hidden v. Actors' Equity Association*, 77 Civ. 2624 (JMC)). The lawsuit was initiated and financed by TARA.

The lawsuit was withdrawn without prejudice in August, 1977, and in or about October, 1977, TARA and Actors' Equity reached agreement on the new Equity Agency Regulations. Most agents then resumed their franchises and began complying with the current Equity Agency Regulations. The new Equity Agency Regulations prohibit commissions on minimum scale jobs, chorus jobs, rehearsal pay, and out-of-town expense money. B3

On or about August 31, 1977, a group of agents, including the plaintiffs, informed Actors' Equity that they had resigned from TARA and that they wished to be represented by the National Association of Talent Representatives, Inc. (NATR), a trade association whose members were talent agents representing actors. Most of the plaintiffs have not been franchised by Actors' Equity since January, 1977. Actors' Equity has invited plaintiffs to become refranchised, but plaintiffs have decided to remain unfranchised.

In order to enforce its rule that members deal only through franchised agents, Actors' Equity has advised members that they could be disciplined for dealing with nonfranchised agents. It was Actors' Equity's practice to send a letter to an actor dealing with a nonfranchised agent, warning the actor that he could be disciplined—a copy of the letter was also sent to the nonfranchised agent. In 1979, Actors' Equity began disciplinary proceedings against members who were dealing with nonfranchised agents—members who would not agree to cease dealing with nonfranchised agents were fined after hearings.

The court finds, however, that Actors' Equity has not required producers to refrain from dealing with nonfranchised agents. While Actors' Equity requested producers not to deal with nonfranchised agents and notified producers that Actors' Equity members could be disciplined for dealing with nonfranchised agents, Actors' Equity never imposed or threatened to impose any sanctions on producers for dealing with nonfranchised agents. In June, 1978, Actors' Equity amended the language of Rule 2(A) in collective bargaining agreements between Actors' Equity and producers; the amendment clarified that actors were the only persons subject to any sanctions for dealing with nonfranchised agents.

Actors' Equity provides standard form individual employment contracts, which the actor and producer must sign when the actor becomes employed by a producer. These individual employment contracts provide blanks for identifying the parties to the contract (including the agent), the production, and essential terms such as the salary, the starting date, and the role to be played. In particular, in 1975 TARA requested Actors' Equity to add a line for identification of the agent into the standard form employment contract used under the "Production Contract" and used in Broadway shows. In 1977, Actors' Equity did print new standard form employment contracts containing a line for identification of the agent.

This court finds that producers were not, in fact, required to fill in the agent identification line on any of the standard form contracts. Producers could leave the agent's line blank, incurring no penalties or further inquiry from Actors' Equity. Even where Actors' Equity has had knowledge that a producer has failed to identify an agent on the standard form employment contract, the evidence does not show that Actors' Equity has taken action against the producer. In fact, producers have frequently not identified nonfranchised agents on the contract, at the request of the agents.

In short, this court finds no evidence to suggest the existence of any conspiracy or illegal combination between Actors' Equity and TARA or between Actors' Equity and producers. The Actors' Equity franchising system was employed by Actors' Equity for the purpose of protecting the wages and working conditions of its members.

CONCLUSIONS OF LAW

Plaintiffs in this case allege that defendant Actors' Equity Association's ("Actors' Equity") franchising system and collective bargaining agreements violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 et seq. Defendants have raised the affirmative defense that defendants' conduct is protected under the statutory and nonstatutory exemptions to the antitrust laws. For the reasons stated below, this court concludes that defendants' conduct is protected under the statutory exemption to the antitrust laws, and accordingly, finds for defendants in this case.

Under Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and under the Norris-LaGuardia Act, 29 U.S.C. §§ 101–115, labor unions are not combinations or conspiracies in restraint of trade; these statutes exempt specific union activities, including secondary picketing and boycotts, from operation of the antitrust laws. *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 621–22, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). Under this statutory exemption from antitrust laws, the Supreme Court held in *United States v. Hutcheson*, 312 U.S. 219, 232, 61 S.Ct. 463, 466, 85 L.Ed. 788 (1941) [footnote omitted], that the activities of a labor organization come within the exemption "[s]o long as a union acts in its self-interest and does not combine with non-labor groups."

In addition, the Supreme Court has fashioned a nonstatutory labor exemption from antitrust laws:

> The Court has recognized . . . that a proper accommodation between the congressional policy favoring collective bargaining under The NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. . . .
>
> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.

Connell Construction Co. v. Plumbers & Steamfitters, supra, 421 U.S. at 622, 95 S.Ct. at 1835 [citation omitted]. B5

In distinguishing between the statutory and nonstatutory exemptions, the Supreme Court has noted that "while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, . . . the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market." *Id.* at 622–23, 95 S.Ct. at 1835 [citation omitted].

This court need not decide whether the nonstatutory exemption is applicable in the case at hand, as this court concludes that the statutory exemption is directly applicable. In particular, this court concludes that under the Supreme Court's decision in *American Federation of Musicians v. Carroll*, 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460 (1968), the activities of the defendants are protected under the statutory exemption to antitrust laws.

As noted above, the Court in *United States v. Hutcheson* established a two pronged test for determining whether a labor organization's activity falls within the statutory exemption: 1) whether a union has combined with nonlabor groups, and 2) whether a union has acted in its self-interest. *See United States v. Hutcheson, supra*, 312 U.S. at 232, 61 S.Ct. 463. As interpreted by the Second Circuit, "[t]he test of whether labor union action is or is not within the prohibitions of the Sherman Act is (1) whether the action is in the union's self-interest in an area which is a proper subject of union concern and (2) whether the union is acting in combination with a group of employers." *Intercontinental Container Transport Corp. v. New York Shipping Assoc.*, 426 F.2d 884, 887 (2d Cir. 1970); *accord, Robertson v. National Basketball Assoc.*, 389 F.Supp. 867, 889 (S.D.N.Y.1975).

In *American Federation of Musicians v. Carroll, supra*, the Supreme Court introduced an "economic interrelationship" criterion in determining whether a union has combined with nonlabor groups—the first prong of the *Hutcheson* test:

> The criterion applied by the District Court in determining that the orchestra leaders were a "labor" group and parties

to a "labor dispute" was the "presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a 'labor group' and party to a labor dispute under the Norris-LaGuardia Act." . . . The Court of Appeals held, and we agree, that this is a correct statement of the applicable principles.

391 U.S. at 105–06, 88 S.Ct. at 1567 [citation omitted]. The Supreme Court in *Carroll* found that the economic interrelationship criterion had been satisfied, in light of the district court's finding that "the orchestra leaders performed work and functions which actually or potentially affected the hours, wages, job security, and working conditions of [the union's] members." *Id.* at 106, 88 S.Ct. at 1567 [footnote omitted].

The Court in *Carroll* specifically addressed the applicability of the "economic interrelationship" criterion to the union's regulation of booking agents:

We think also that the caterer and booking agent restrictions "are at least as intimately bound up with the subject of wages," . . . as the price floors. The District Court found that the booking agent regulations were adopted because of experience that "many booking agents charged exorbitant fees to members and booked engagements for musicians at wages which were below union scale." . . . On the basis of these findings, the District Court concluded:

"Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of [the unions], I find that they are in an economic interrelationship with the members * * * such that the [unions] are justified in regulating their activities * * *. Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale and working conditions." . . .

Id. at 113, 88 S.Ct. at 1571 [bracketed material in original].

In applying the second prong of the *Hutcheson* test, the Court did not specifically inquire whether the union's activity was in its own "self-interest." Instead, the *Carroll* Court appeared to use several interchangeable tests to determine whether the union's activity actually protected the wages, hours, or working conditions of union members. *See Adams, Ray & Rosenberg v. William Morris Agency*, 411 F.Supp. 403, 409–10 (C.D.Cal.1976). Thus, the Court seemingly applied the following tests:

1) whether "the union has a legitimate interest" (391 U.S. at 107, 88 S.Ct. at 1568);

2) whether the activities "in actuality operate to protect the wages" (*Id.* at 108, 88 S.Ct. at 1568);

3) whether the activities "were expressly designed to and did function as a protection of * * * wage scales" (*Id.* at 108, 88 S.Ct. at 1568);

4) whether the activities "are simply a means for coping with the job and wage competition . . . to protect the wage scales" (*Id.* at 109, 88 S.Ct. at 1569);

5) whether the activities bear "a close relation to labor's efforts to improve working conditions" (*Id.*);

6) whether the activities are "a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure" (*Id.* at 110, 88 S.Ct. at 1569);

7) whether the activities are "intimately bound up with the subject wages" (*Id.* at 113, 88 S.Ct. at 1571); and

8) whether the activities are "reasonably related to their interest in maintaining observance of union scale wages and working conditions" (*Id.*).

Thus, the Court in *Carroll* apparently was satisfied that the union's activities in that case were in the union's self-interest. The Court's analysis in *Carroll* was perhaps best characterized by the district court in *Adams, Ray & Rosenberg v. William Morris Agency, supra*, at 410:

It thus appears that the test to determine if a union's actions are in its "self-interest" has not been precisely formulated. But the principle that emerges from the relevant cases is that a union's acts are in its "self-interest," as that term is used in *Hutcheson*, if they bear a reasonable relationship to a legitimate union interest.

This court concludes that, under the standards set forth in *Hutcheson* and *Carroll*, defendants' activities clearly fall within the statutory labor exemption to antitrust laws. First, it is clear that the defendant Actors' Equity has not combined with nonlabor groups, as there is an economic interrelationship between Actors' Equity and the agents alleged by plaintiffs to be a "nonlabor group." In light of this economic interrelationship affecting the legitimate union interests of Actors' Equity, the agents were a "labor group" and party to a "labor dispute," thus falling within the statutory labor exemption to antitrust laws.

The record in this case leaves little doubt as to the economic interrelationship between the members of Actors' Equity and the agents. Testimony confirmed that agents play an integral role in the industry; without an agent, an actor would have significantly lesser chances of gaining employment. The evidence clearly supports the conclusion that agents perform work and functions which actually or potentially affect the wages, job security, and working conditions of Actors' Equity members. As in *Carroll*, the agents in this case have a direct and substantial effect on the wages of union members. In short, defendants have convincingly demonstrated an economic interrelationship between agents and Actors' Equity members, and accordingly, the first prong of the *Hutcheson* test is satisfied.

Defendants have satisfied the second prong of the *Hutcheson* test as well. The regulations imposed by Actors' Equity upon its members are without doubt designed to protect union wage scales. Both franchising of agents and the restrictions on agents' commissions operate to protect wage scales; as in *Carroll*, these union activities are "a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure." In short, this court finds that the activities of Actors' Equity bear a reasonable relationship to legitimate union interests—union scale wages and working conditions.

Plaintiffs have offered a number of theories in their attempt to distinguish the case at hand from *Carroll*. First, plaintiffs argue that in *Carroll* the union members did not have a collective bargaining agreement with employers, such as the "father of the bride," while in the case at hand Actors' Equity has collective bargaining agreements with most of the employers of its members. This argument is of no avail, however, as Actors' Equity has a legitimate union interest in protecting its members' wages and working conditions, even beyond whatever protection is already afforded by collective bargaining agreements. Moreover, the Court's holding in *Carroll* was in no way limited to those instances where union members were not employed under collective bargaining agreements.

Second, plaintiffs argue that in *Carroll* the orchestra leaders were in competition with union members for jobs, while in the case at hand agents are not in competition with members of Actors' Equity. Plaintiffs' argument seriously misconstrues *Carroll*, unjustifiably limiting its holding to cases involving competition between union members and the alleged "nonlabor" group. In fact, *Carroll* explicitly applies where there is the "presence of a job or wage competition *or* some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." 391 U.S. at 105-06, 88 S.Ct. at 1567 [emphasis added]. Plaintiffs' assertion that the term "economic interrelationship" is to be narrowly construed to cover situations involving actual competition is without support; the plain meaning of the Court's language in *Carroll* is that an economic interrelationship affecting legitimate union interests between Actors' Equity members and their agents will

suffice. This court recently stated in *Robert Redfield, d/b/a The Redfield Agency v. American Federation of Musicians of the United States and Canada, AFL–CIO*, 71 Civ. 3091 (S.D.N.Y. Sept. 18, 1978):

> Plaintiff argues that *Carroll* does not apply to professional booking agents such as plaintiff, but only to booking agents who also work as orchestra leaders, as did the plaintiffs in *Carroll*. Neither the language nor the rationale of *Carroll* limits its holding to cases where the booking agent is also an orchestra leader.

In short, this court concludes that *Carroll*'s economic interrelationship criterion is not limited to cases involving actual competition.

Third, plaintiffs argue that in *Carroll* booking agents apparently were not licensed or regulated by any government agency, while in the case at hand agents are licensed by the Department of Consumer Affairs of New York City and are comprehensively regulated pursuant to article 11 of the General Business Law of the State of New York. Plaintiffs' argument would perhaps carry some force, if in fact the New York licensing and regulation afforded members of Actors' Equity the same protection as the union activities in question. However, it is clear that Actors' Equity is attempting to afford protection beyond that of New York law, both by protecting members who work outside of New York and by affording protection much more comprehensive than that of New York law. The existence of protection under New York law should not preclude union attempts to protect further the interests of union members.

Fourth, plaintiffs argue that in *Carroll* the licensing provisions in question were enacted unilaterally by the union, while in the case at hand the franchising provisions were "part of a sweetheart deal to benefit TARA to the exclusion of other agents" and "part of a larger combination and conspiracy in violation of the antitrust laws." As this court's findings of fact indicate, plaintiff has not successfully demonstrated the existence of any such sweetheart deal or conspiracy. Plaintiffs have not demonstrated that Actors' Equity's regulation of agents was either applied in a discriminatory fashion favoring TARA agents or was designed to operate to the advantage of TARA agents. While TARA did request Actors' Equity to enforce the rule that Actors' Equity members may not deal with nonfranchised agents, this could hardly be a conspiracy against the plaintiffs, as the plaintiffs were TARA members at the time. Nor is TARA's agreement to Actors' Equity's increase of franchise fees sufficient evidence of conspiracy.

In cases where a plaintiff alleges a conspiracy in violation of the Sherman Act against a union, the plaintiff must meet the "clear proof" standard of proof. *Ramsey v. United Mine Workers of America*, 416 F.2d 655, 661–63 (6th Cir. 1969). In the case at hand, plaintiff has met neither the "clear proof" standard nor the more usually applicable "preponderance of the evidence" standard in its attempt to demonstrate a conspiracy between TARA and Actors' Equity.

Fifth, plaintiffs argue that in the case at hand producers conspired with Actors' Equity to not deal with nonfranchised agents. In support of this contention plaintiffs offered hearsay evidence consisting of testimony by plaintiffs' witnesses as to statements made by producers allegedly in furtherance of the conspiracy. This court took the testimony subject to proof by plaintiffs with independent evidence of the existence of such a conspiracy. The court reserved decision on defendants' subsequent motions to strike the hearsay testimony. Upon careful consideration of the record, this court now grants defendants' motion to strike, as plaintiffs have failed to prove with independent evidence the existence of any conspiracy. While this court's findings of fact discuss in detail the independent evidence allegedly establishing the existence of a conspiracy, a brief recapitulation is in order.

While Actors' Equity did request producers to refrain from dealing with nonfranchised agents, plaintiffs have not demonstrated that Actors' Equity required pro-

ducers to refrain from dealing with nonfranchised agents. Such requests certainly do not suffice to demonstrate the existence of a conspiracy. Nor do Actors' Equity's restrictions upon its own members constitute a conspiracy. Finally, plaintiffs have not successfully demonstrated a conspiracy resulting from the alleged requirement of Actor's Equity that producers identify the agent of record on the standard form individual employment contracts. In summary, as the plaintiff has failed to demonstrate with independent evidence the existence of a conspiracy between Actors' Equity and producers, the hearsay evidence as to statements of producers must be struck from the record.

Finally, plaintiffs argue that the restrictions imposed by Actors' Equity's franchising system do not further any legitimate labor objective. In particular, plaintiffs focus their challenge upon several features of the franchising system. Plaintiffs object to the prohibition of commissions on scale wage jobs, chorus jobs, out-of-town expense money, and rehearsal wages. Plaintiffs' assertion that commissions affect an actor's disposable income but do not affect wages is unpersuasive. This court concludes that, under the facts of this case, commissions on these items are intimately bound with the subject of wage scales. Unlike theatre ticket prices, photographers' fees, commuting costs, or grocery prices, commissions are directly and proportionately related to wages.

Plaintiffs also object to the requirement that agents pay fees in order to be franchised. This court is of the opinion that the franchise fees are reasonably related to the operation of the franchise system and the system's protection of wage scales and working conditions. While conceivably Actors' Equity might someday decide to charge a fee so high as to not be reasonably related to the operation of the franchise system and its goals, the facts before this court do not present that situation. In summary, this court finds that the franchising system of Actors' Equity is reasonably related to legitimate labor objectives.

Since this court concludes that defendants' activities are protected under the statutory labor exemption to antitrust laws, it is unnecessary to address several issues presented by defendants: whether Actors' Equity's regulations are unreasonable restraints of trade, whether plaintiffs are barred by their conduct from obtaining equitable relief, and whether an action can be maintained against defendant Grody in his individual capacity.

This court concludes that defendant Actors' Equity acted in its own self-interest concerning matters intimately bound with wage scales and working conditions, and without conspiring or combining with any nonlabor group. Accordingly, defendants are protected by the statutory exemption from antitrust laws. This court finds that the complaint in this action should be dismissed and judgment entered for defendants.

So ordered.

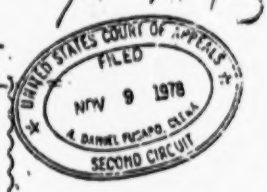
APPENDIX C
SECOND CIRCUIT AFFIMANCE OF DISTRICT COURTS DENIAL
OF A MOTION FOR PRELIMINARY INJUNCTION.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of November , one thousand nine hundred and seventy-eight.

Present:
Hon. Irving R. Kaufman,
Chief Judge,
Hon. Walter R. Mansfield,
Hon. Thomas J. Meskill,
Circuit Judges.

7-7-13



H. A. ARTISTS & ASSOCIATES, INC., S.T.E. REPRESENTATION LTD., J. MICHAEL BLOOM, LTD., DON BUCHWALD & ASSOCIATES, INC., MARJE FIELDS, INC., HENDERSON HOGAN AGENCY INC., OPPENHEIM-CHRISTIE ASSOCIATES LTD., JOEL PITT LTD., TALENT REPRESENTATIVES INC., D.M.I. TALENT ASSOCIATES, LTD., JEAN THOMAS AGENCY, INC., BOB WATERS AGENCY, INC., JACOBSON-WILDER, INC., WILLIAM D. CUNNINGHAM & ASSOCIATES, INC., TRANUM ROBERTSON & HUGHES, INC., MONTY SILVER AGENCY LTD., BRET ADAMS, LIMITED, MICHAEL THOMAS AGENCY, INC., LESTER LEWIS ASSOCIATES, INC., LEAVERTON ASSOCIATES LTD., JOE JORDAN TALENT AGENCY INC., RAGLYN-SHAMSKY, LTD., ANN WRIGHT REPRESENTATIVES, INC.,

Plaintiffs-Appellants,

v.

ACTORS EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Defendants-Appellees.

78-7343

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appellants allege that Equity has unlawfully conspired with producers to prevent them from representing actors because appellants refuse to comply with Equity's franchising regulations and sought a preliminary injunction which Judge Motley denied.

To merit a preliminary injunction, "the plaintiffs must prove that they are likely to succeed on the merits and they are suffering irreparable injury, or they must prove that they have shown serious questions going to the merits and a balance of hardships tipping decidedly towards them." Sonesta International Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (2d Cir. 1973).

Equity has offered to re-franchise appellants pendente lite. Trial has been set for February, 1979. By temporarily submitting, albeit under protest, to Equity's longstanding regulations until a disposition on the merits can be reached, appellants can avoid the economic and professional injury they might otherwise suffer as a result of the allegedly illegal franchising and "blacklisting" procedures enforced by Equity.

Thus, appellants have failed to demonstrate the requisite irreparable injury or balance of hardships. "[A] district court's denial of preliminary relief is usually subject to reversal only in the case of a clear abuse of discretion. . . ." National Association of Letter Carriers v. Sombrotto, 449 F.2d 915, 921 (2d Cir. 1971); Moore's Federal Practice, ¶ 65.04[1]. No such abuse of discretion has been demonstrated.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

Irving R. Kaufman, Chief Judge,

Walter R. Mansfield,

Thomas J. Meskill,
Circuit Judges.

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APPENDIX D
DISTRICT COURTS DENIAL OF MOTION FOR PRELIMINARY INJUNCTION.

H.A. ARTISTS & ASSOCIATES, INC. et al.,

Plaintiffs,

- against -

78 Civ. 2452

ACTORS EQUITY ASSOCIATION, etc., et al.,

Defendants.

APPEARANCES

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Attorneys for Defendants

[illegible] MOTLEY, D.J.

Findings of Fact and Conclusions of Law

Plaintiffs are theatrical agents who are suing Actor's Equity Association (Equity) under the federal anti-trust statutes. Plaintiffs have moved for a preliminary injunction. This request is denied. See order signed this date.

Plaintiffs seek to enjoin Equity's enforcement of its rule that Equity members may not deal with agents who do not comply with Equity regulations for agents. These regulations, known as Rule A, limit the fee that agents can charge an actor. Equity also requires that agents be franchised by Equity and pay Equity a small franchise fee. Equity has entered into a collective bargaining agreement with the producers who hire the actors. As part of that collective bargaining agreement, a producer is required to send Equity a copy of any contract it makes with an actor. That contract must specify the actor's agent. In the event that Equity finds that an actor is using a nonfranchised agent, such as one of the plaintiffs here, Equity may discipline the actor. Equity also notifies the producers of the names of the agents who are not franchised by Equity. Equity has had this system in effect for some fifty years, as have other performers' unions.

In order to obtain a preliminary injunction the plaintiffs must prove that they are likely to succeed on the merits and they are suffering irreparable injury, or they must prove that they have shown serious questions going to the merits and a balance of hardships tipping decidedly towards them. Sonesta Int'l Hotels Corp. v. Wellington Associates, 483 F. 2d 247, 250(2d Cir. 1973).

In order to show a liklihood of success on the merits here the plaintiffs must show a liklihood that Equity's actions are not immune from the antitrust laws under the labor exemption. Title 15, U.S.C. §17 states:

> Antitrust laws not applicable to labor organizations
>
> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existance and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held... to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

See also 29 U.S.C. §§101-115, 15 U.S.C. §52.

A union is not exempt from the antitrust laws if it combines with a non-labor group or if its actions are not taken in its own self-interest. Connell Construction Co. v. Plumbers Local 100, 421 U.S. 635 (1975). The

court finds that plaintiffs have not shown a likelihood that Equity's actions falls into either of these two areas which are outside the labor exemption.

In American Federation of Musicians v. Carroll, 391 U.S. 99 (1968), the Supreme Court held that a musicians' union's regulation of booking agents and of food caterers was exempt from the federal antitrust laws because the agents and caterers were in an "economic interrelationship" with the members of the musicians' union such that the agents and caterers were part of a labor group and were involved in a labor dispute with the union. The Court also found that the regulations were reasonably related to the union's interest in maintaining wages and conditions for its members. See also Garrett v. American Federation of Musicians, 98 L.R.R.M. 2078 (D.S.C. 1978) (upheld musicians' union's regulation of booking agents and circulation of "unfair" list of agents who did not comply with union rules); Adams, Ray & Rosenberg v. William Morris Agency, 411 F. Supp. 403 (C.D. Ca. 1976) (denial of a preliminary injunction against writers' union's regulation of agents on the ground that Carroll was likely to control).

In Carroll, supra, the court also upheld the union's practice, similar to Equity's practice, of gather-

ing information about agents by requiring that all contracts, which included the name of the agent, be filed with the union.

Plaintiffs contend that Equity has "blacklisted" the non-franchised agents by notifying the producers that actors will be subject to discipline if they violate Equity's rules with respect to employment of non-franchised agents. The letter cited by plaintiffs does not support their contention that the producers were solicited to blacklist the plaintiffs. Plaintiffs have not shown that Equity was doing anything more than disseminating information to the producers.

While the question whether the agents and actors are in an economic relationship such that they are in a labor dispute, and the question whether the regulations are in Equity's reasonable self-interest are questions for trial, plaintiffs have not made a sufficient showing to overcome the liklihood that Equity's actions will be exempt from the federal antitrust laws under the labor exemption.

Therefore, plaintiffs' request for a preliminary injunction enjoining the operation of Equity's regulation of agents is denied.

Dated: June 29, 1978
New York, New York

Constance Baker Motley, U.S.D.J.

APPENDIX E

CLAYTON ACT §20, 29 U.S.C. §52

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between persons employed and persons seeking employment involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other monies or things of value; or from peaceably assembling in a lawful manner, and for lawful purpose; or from doing any act or thing

which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

APPENDIX F
SECTIONS 5 - 15 OF THE NORRIS - LA GUARDIA ACT
(29. U.S.C. §105 - 115.)

§ 105. Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Mar. 23, 1932, c. 90, § 5, 47 Stat. 71.

§ 106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

§ 107. Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief:

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity.

Mar. 23, 1932, c. 90, § 7, 47 Stat. 71.

§ 108. Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute ei-

ther by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Mar. 23, 1932, c. 90, § 8, 47 Stat. 72.

§ 109. Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

Mar. 23, 1932, c. 90, § 9, 47 Stat. 72.

§ 110. Review by Court of Appeals of issuance or denial of temporary injunctions; record; precedence

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

Mar. 23, 1932, c. 90, § 10, 47 Stat. 72; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

§§ 111, 112. Repealed. June 25, 1948, c. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948

§ 113. Definitions of terms and words used in chapter

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or

who are members of the same or an affiliated organization of employers or employees; whether such dispute is (1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Mar. 23, 1932, c. 90, § 13, 47 Stat. 73.

§ 114. Separability of provisions

If any provision of this chapter or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of this chapter and the application of such provisions to other persons or circumstances shall not be affected thereby.

Mar. 23, 1932, c. 90, § 14, 47 Stat. 73.

§ 115. Repeal of conflicting acts

All acts and parts of acts in conflict with the provisions of this chapter are repealed.

Mar. 23, 1932, c. 90, § 15, 47 Stat. 73.

APPENDIX G

GENERAL BUSINESS LAW OF THE STATE OF NEW YORK, ARTICLE 11

§180. Theatrical employment; financial investigations and security

A theatrical employment agent shall investigate whether or not any employer (person, firm or corporation) who is offering employment to an applicant for employment has defaulted in the payment of salaries, fees or other compensation to any performer or group of performers or has left stranded any performing companies or individuals or groups, during the five years preceding the date of the application. An agent shall not procure or undertake to procure employment or engagements on the part of any performer or groups of performers for an employer who has failed to pay salaries, fees or other compensation, or who has left stranded any performer or groups of performers or any performing companies or individuals during the five years preceding the date of the application, unless such employer (person, firm or corporation) shall provide sufficient security for the direct benefit of the performer or performers and in an amount ample to pay the performer or performers their full compensation for the special employment or engagement designated in the employment or engagement contract. The provisions of this section shall not apply to employment or engagements in modeling.

§183. Theatrical employment; contracts

Every licensed person who shall procure for or offer to an applicant a theatrical engagement shall have executed in duplicate a contract or deliver to the parties as herein set forth

a statement containing the name and address of the applicant; the name and address of the employer of the applicant and of the person acting for such employer in employing such applicant; the time and duration of such engagement; the amount to be paid to such applicant; the character of entertainment to be given or service to be rendered; the number of performances per day or per week that are to be given by said applicant; if a vaudeville engagement, the name of the person by whom the transportation is to be paid, and if by the applicant, either the cost of transportation between the places where said entertainment or services are to be given or rendered, or the average cost of transportation between the places where such services are to be given or rendered; and if a dramatic engagement the cost of transportation to the place where the service begin if paid by the applicant; and the gross commission or fees to be paid by said applicant and to whom. Such contracts or statements shall contain no other conditions and provisions except such as are equitable between the parties thereto and do not constitute an unreasonable restriction of business. Forms of such contract and statement in blank shall be first approved by the commissioner and his determination shall be reviewable by certiorari. One of such duplicate contracts or of such statements shall be delivered to the person engaging the applicant and the other shall be retained by the applicant. The licensed person procuring such engagement for such applicant shall keep on file or enter in a book provided for that purpose a copy of such contract or statement.

§185. Fees

1. Circumstances permitting fee. An employment agency shall not charge or accept a fee or other consideration unless in accordance with the terms of a written contract with a job applicant, except for class "A: and "A1" employment, and except after such agency has been responsible for referring such job applicant to an employer or such employer to a job applicant and where as a result thereof such job applicant has been employed by such employer. The maximum fees provided for herein for all types of placements or employment may be charged to the job applicant and a similar fee may be charged to the employer. By agreement with an employment agency, the employee may voluntarily assume payment of the job applicant's fee. The fees charged to employers by any licensed person conducting an employment agency for rendering services in connection with, or for providing employment in classes "A", "A1", and "B", as hereinafter defined in subdivision four of this section where the applicant is not charged a fee shall be determined by agreement between the employer and the employment agency. No fee shall be charged or accepted for the registration of applicants for employees or employment.

2. Size of fee; payment schedule. The gross fee charged to the job applicant and the gross fee charged to the employer each shall not exceed the amounts enumerated in the schedule set forth in this section, for any single employment or engagement, except as hereinabove provided; and such fees shall be subject to the provisions of section one hundred eighty-six of this article. Except as otherwise provided herein, an employment agency shall

not require an applicant, while employed in the continental United States, and paid weekly, to pay any fee at a rate greater than in six equal weekly installments each of which shall be payable at the end of each of the six weeks of employment or, if paid less frequently, in three equal installments, each of which shall be payable at the end of the first three pay periods following his employment, or within a period of six weeks, whichever period is shorter. An employer's fee shall be due and payable at the time the applicant begins employment, unless otherwise determined by agreement between the employer and the agency.

3. Deposits, advance fees. Nothwithstanding any other provisions of this section, an employment agency may not require a deposit or advance fee from any applicant except an applicant for class "A" or class "A1" employment, and only to the extent of the maximum fees hereinafter provided. Such deposit or advance fee shall be offset against any fee charged or accepted when such employment is obtained. Any excess above the lawful fee shall be returned without demand therefor, immediately after the employment agency has been notified that such employment has been obtained; and all of such deposit or advance fee shall be returned immediately upon demand therefor, if at the time of the demand such employment has not been obtained.

4. Types of employment. For the purpose of placing a ceiling over the fees charged by persons conducting employment agencies, types of employment shall be classfied as follows:

Class "A" - domestics, household employees, unskilled

or untrained manual workers and laborers, including agricultural workers;

Class "A1" - nonprofessional trained or skilled industrial workers or mechanics;

Class "B" - commercial, clerical, executive, administrative and professional employment, all employment outside the continental United States, and all other employment not included in classes "A", "A1", "C" and "D";

Class "C" - theatrical engagements;

Class "D" - nursing engagements as defined in article one hundred thirty-nine of the education law.

5. Fee ceiling. For a placement in class "A" employment the gross fee, including the deposit if any, shall not exceed, in percentage of the furst full month's salary or wages, the following:

where no meals or lodging are provided.....10%

where one meal per working day is provided.....12%

where two meals per working day are provided.....14%

where three meals and lodging per working day are provided.....18%

Where all parties to the employment agreement understand or agree at the time the employment is entered into that it shall be for a period shorter than one month, the gross fee shall not exceed ten per cent, twelve per cent, fourteen per cent or eighteen per cent respectively of the salary or wages actually paid.

6. Fee ceiling. For a placement in Class "A1" employment the gross fee shall not exceed one week's wages where all parties to the employment agreement understand or agree at the time

the employment is entered into that it shall be for a period for ten weeks or more. Where all parties to the employment contract agree and understand at the time the employment contract is entered into that it shall be for a period shorter than ten weeks, the gross fee shall not exceed ten per cent of the wages or salary actually received.

7. Fee ceiling. For a placement in Class "B" employment the gross fee shall not exceed, in percentage of the first full month's salary or wages, the following:

where such first full month's salary or wages is

less than $225.....25%

at least $225 but less than $270.....35%

at least $270 but less than $300.....40%

at least $300 but less than $330.....45%

at least $330 but less than $365.....50%

at least $365 but less than $400.....55%

at least $400 or more.....60%

Provided however, that where the placement is for employment in which the applicant will be paid on a straight commission basis or on the basis of a drawing account plus commissions, the gross fee shall be based on percentages in the above schedule applied to an amount equivalent to one-twelfth of the estimated first year's earnings, as estimated by the employer.

Where all parties to the employment contract agree and understand at the time the employment contract is entered into that it shall be for a period shorter than four months the gross fee shall not exceed fifty per cent of the fee prescribed in the schedule in this subdivision or ten per cent of the wages or salary actually received, whichever is less.

8. Fee ceiling. For a placement in class "C" employment the gross fee shall not exceed, for a single engagement, ten per cent of the compensation payable to the applicant, except that for employment or engagements for orchestras and for employment or engagements in the opera and concert fields such fees shall not exceed twenty per cent of the compensation.

9. Fee ceiling. For a placement in class "D" employment the gross fee shall not exceed, for a single engagement, the following:

(1) for private nursing duty, five per cent of the salary or wages received each week through the first ten weeks of that engagement only, and such fee shall be due and payable at the end of each such week;

(2) for any other nursing duty, the amount of the first week's salary or wages unless the first year's computed salary or wages to be derived for at least one year's employment is twenty-five hundred dollars or more, in which event the gross fee shall not exceed, in percentage of such salary or wages, the following:

where such first year's salary or wages is:

at least $2500 but less than $3000.....2-1/2%

at least $3000 but less than $3500.....3%

at least $3500 but less than $4000.....3-1/2%

at least $4000 but less than $4500.....4%

at least $4500 but less than $5000.....4-1/2%

$5000 or more.....5%

Supreme Court, U. S.
FILED
SEP 4 1980
MICHAEL RODAK, JR., CLERK

No. 80-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

H.A. ARTISTS & ASSOCIATES, INC., S.T.E. REPRESENTATION LTD., J. MICHAEL BLOOM, LTD., DON BUCHWALD & ASSOCIATES, INC., MARJE FIELDS, INC., HENDERSON/HOGAN AGENCY INC., OPPENHEIM-CHRISTIE ASSOCIATES LTD., JOEL PITT LTD., TALENT REPRESENTATIVES INC., D.M.I. TALENT ASSOCIATES, LTD., JEAN THOMAS AGENCY, INC., BOB WATERS AGENCY, INC., JACOBSON-WILDER, INC., WILLIAM D. CUNNINGHAM & ASSOCIATES, INC., TRANUM ROBERTSON & HUGHES, INC., MONTY SILVER AGENCY LTD., BRET ADAMS, LIMITED, MICHAEL THOMAS AGENCY, INC., LESTER LEWIS ASSOCIATES, INC., LEAVERTON ASSOCIATES LTD., JOE JORDAN TALENT AGENCY INC., RAGLYN-SHAMSKY, LTD., ANN WRIGHT REPRESENTATIVES INC.,

Petitioners.

—against—

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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APPENDIX A

Decision of Second Circuit Affirming District Court's Decision to Dismiss the Complaint

[A1] [¶ 63,376]

H. A. Artists & Associates, Inc., *et al.*

v.

Actors Equity Association and Donald Grody.

U.S. Court of Appeals, Second Circuit. Docket No. 79-7821. No. 875, September Term, 1979. Decided May 23, 1980. Appeal from dismissal of a complaint by theatrical agents against actors' union, alleging antitrust violations. 478 F. Supp. 496 (S.D.N.Y. 1979) (Motley, J.), affirmed.

* * * * *

Before:

Lumbard, Mansfield, *Circuit Judges* and
Bartels, *District Judge.**

Lumbard, Cir. J.: Appellants, theatrical agents who act as intermediaries between actors and producers, appeal from a judgment of the District Court for the Southern District of New York, 478 F. Supp. 496 (1979) (Motley, J.), holding certain practices of defendant union Actors Equity ("Equity") immune from challenge under the antitrust laws because protected by the "statutory labor exemption." We affirm.

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* Hon. John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

[*System of Franchising Theatrical Agents*]

At issue in this case is Equity's system of "franchising" theatrical agents. Agents pay a fee and agree to abide by certain restrictions in return for certification as "franchised" agents. Equity encourages agents to become franchised by forbidding its members to deal with unfranchised agents. Equity members who negotiate contracts using the services of unfranchised agents are subject to union discipline, including fines.

[*Agent Restrictions*]

The most important of the restrictions placed upon franchised agents is the requirement that they renounce any right to take commissions on contracts under which an actor receives scale wages. Scale wages are set by a collective bargaining agreement between Equity and theatrical producers, to which the agents are not parties. To the extent that a contract includes provisions under which an actor will sometimes receive scale pay (as for rehearsal periods and "chorus" employment) and sometimes more, the franchise regulations deny the agent any commission on the scale portions of the contract. Franchised agents are also precluded from taking commissions on certain expense money paid to union members; commissions are limited on wages within 10% of scale pay; and [A2] agents must allow actors to terminate a representation contract if the agent is unsuccessful in procuring employment for the actor within a specified period of time.

Some theatrical agents find this system acceptable, and this group—which has formed a trade association called TARA—is not a party in this litigation.

The district court did not reach the question of whether or not the franchise system is an unreasonable restraint of trade, or constitutes *per se* illegal price-fixing, because it

found that the union's actions in creating and maintaining the franchise system were fully protected by the "statutory" labor exemption from the antitrust laws, which removes from antitrust scrutiny unilateral action by a labor union pursuing the interests of its members. The "statutory" exemption has its source in judicial readings of sections 6 and 20 of the Clayton Act, 15 U.S.C. §§ 17, 29, and of the Norris-LaGuardia Act, 29 U.S.C. §§ 105-115. Under the leading "statutory" labor exemption case of *United States* v. *Hutcheson* [1940-1943 TRADE CASES ¶ 56,091], 312 U.S. 219 (1941), the threshold issue is whether or not Equity's franchising of agents has involved any combination between Equity and any "non-labor groups" or persons who are not "parties to a labor dispute." *Id.* at 232. If it has, the protection of the exemption does not apply.[1]

[*Combination with Non-Labor Group*]

Most employers qualify as a "non-labor group," [2] and the court below considered whether or not there was any agreement, either explicit or tacit, between Equity and the producers to establish or police the franchise system. We do not believe the district court was clearly erroneous in finding that the collective bargaining agreement does not reveal any combination between Equity and the producers with

---

[1] If a court finds that there has been an agreement between a union and a "non-labor group", the agreement may still be entitled to antitrust immunity under the "non-statutory" exemption. *Connell Construction Co.* v. *Plumbers Local 100* [1975-1 TRADE CASES ¶ 60,341], 421 U.S. 616, 622 (1975). Since both the "statutory" and "non-statutory" exemptions are based on judicial readings of the Sherman, Clayton and Norris-LaGuardia Acts, this choice of terminology seems unfortunate. See I Areeda & Turner, *Antitrust* (1978) § 229 at 192.

[2] An exception is an employer in job competition with his employees, e.g., a bandleader who sometimes both leads a band and plays an instrument. *American Federation of Musicians* v. *Carroll* [1968 TRADE CASES ¶ 72,456], 391 U.S. 99 (1967).

respect to agents, Fed. R. Civ. P. 52(a), *Meat Cutters* v. *Jewel Tea Co.* [1965 TRADE CASES ¶ 71,463], 381 U.S. 676, 694 (1965).

Appellants argue that the provision in the collective bargaining agreement that standard employment contracts include a space for the actor's agent's name, and another provision of the agreement that requires this line to be filled in, is evidence that the producers agree with Equity to help the union police its franchise system. We disagree. As the district court found, there was evidence that contracts were often executed leaving blank the line left for the agent's name, and that, even so, Equity honored such contracts and did not take any action against members who worked under such contracts. The provision requiring that every line be filled in far antedated the appearance of the line for "name of agent." The district court was not clearly erroneous in concluding that Equity did not in fact require that this line be filled in.

The collective bargaining agreement aside, appellants argue that various statements made by Equity officials to union members and to producers are evidence of a combination between Equity and the producers with regard to agent franchising. We have examined each of the statements in the record adduced to support this point and we conclude that the district court's finding that they do not demonstrate any such combination cannot be labeled clearly erroneous. Unilateral pronouncements by Equity such as that "only franchised agents may negotiate employment deals for Equity performers" are not proof of an agreement because they may mean no more than that Equity members are forbidden from dealing with unfranchised agents. Such a prohibition, of course, since it serves the union's self-interest is a matter of proper union concern and does not involve a non-labor group, is safe from antitrust scrutiny under the statutory exemption. *United States* v. *Hutcheson, supra.*

There is some evidence in the record that Equity sought the producers' cooperation in enforcing the franchise system during the 1975 negotiations between Equity, TARA and the producers. And Equity officials did tell their membership that producers had an "obligation" to avoid using unfranchised agents. But such unilateral expressions, in the absence of any indication from the producers that they had agreed to cooperate or that they had accepted Equity's view of their "obligations," is not [A3] evidence from which the court was required to find that a "combination" had been formed. Our conclusion is also based on the fact that there was no evidence at trial that any producer had considered himself bound by the union's statements; nor did any producer testify that he had been pressured not to deal with unfranchised agents, or that he had reported unfranchised agents to the union.

[*Franchised Agents as Labor Group*]

But on the record in this case we discern a combination between the union and individuals who appear as if they might be members of a "non-labor" group. These individuals are those agents who have agreed with the union to become franchised, and these agreements must be scrutinized to determine if they are agreements that would divest Equity's franchise system of the protection of the "statutory" exemption. In our view, they do not because the agents involved are a "labor group."

In *American Federation of Musicians* v. *Carroll* [1968 TRADE CASES ¶ 72,456], 391 U.S. 99 (1967), the Supreme Court identified the test for distinguishing a labor group from a non-labor group as ". . . the presence of job or wage competition or some other economic inter-relationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed, the independent contractors were a 'labor

group' . . ." 391 U.S. at 106, quoting [1965 TRADE CASES ¶ 71,546], 241 F. Supp. at 887. The above language is taken from the *Carroll* court's discussion of whether or not bandleaders in the "club date" field could be subjected to certain forms of union restrictions. Since the central holding in the case was that the fact that bandleaders sometimes performed as musicians meant that such restrictions were valid, most of the opinion deals with the "job or wage competition" branch of the disjunctive test quoted above. But the *Carroll* court also approved the musicians' union's restrictions on booking agents' commissions, which were enforced through a "licensing" system analogous to the "franchising" system at issue in the case at bar, 391 U.S. at 116-17.

Unlike the bandleaders, the agents in *Carroll* were not in any kind of "job or wage competition" with union members. The court's *sub silentio* application of the statutory exemption therefore supports the view that the musicians and the booking agents were in a sufficient "economic interrelationship" to justify union regulation. Because of the vagueness of this term, however, we believe the matter calls for further explanation.

Most unions are in an "economic interrelationship" with the employers of their membership. When the union gains a wage increase, the employers give up corresponding amounts of money (though not necessarily corresponding profits, because labor costs can often be passed along to consumers). But such an "economic interrelationship" does not suffice to make an employer a "labor group", or even a "party to a labor dispute"; otherwise there would be no need for the "non-statutory" exemption, which was developed largely to provide an exemption for union agreements with employers. *Connell Construction Co.* v. *Plumbers Local 100* [1975-1 TRADE CASES ¶ 60,341], 421 U.S. 616, 622 (1975). To choose a different example, there is an "eco-

nomic interrelationship" between a labor union and the buyers of goods produced by the union members' employer. If, for example, steelworkers were to win a wage raise of enormous size, various users of steel products, such as automobile manufacturers, would be adversely affected. Yet a combination between the steelworkers and an automobile manufacturer would not be entitled to the benefit of the statutory exemption because of this "economic interrelationship."

For purposes of this case, it is enough to note that the "economic interrelationship" test has never been used to immunize from antitrust challenge anything more than a union's effort to regulate parties, who, because of industry structure, stand athwart the current of wages paid by employers to union members; and that these efforts have been associated with attempts to defend the integrity of *minimum* wages. See, e.g., *Adams, Ray & Rosenberg* v. *William Morris Agency,* 411 F. Supp. 403 (C.D. Cal. 1976). In industries where it is necessary or customary for union members to secure employment through agents, and agents' fees are calculated as a percentage of wages set by a collective bargaining agreement, such agents must be considered a "labor group" because the union cannot eliminate wage competition among its members without regulation of the fees of the agents.

[*Legitimate Labor Goal*]

Once it is determined that the union's actions have involved no combination with [A4] a non-labor group, it remains, under *United States* v. *Hutcheson, supra,* only to decide if the goal being pursued in [sic] within the area of the union's legitimate self-interest. In the case at bar, Equity, through its franchising system, seeks primarily to protect from encroachment a minimum wage in an industry where

the maintenance of a minimum wage poses problems of particular intractability. The possibility that job-hungry actors will work through agents who take excessive commissions is a matter of legitimate union concern. The goal of the agent restrictions is the elimination of wage competition, traditionally one of the most sacrosanct goals of national labor policy.

To this point, we have been concerned with the core of Equity's franchising system—the securing by the union of an agreement from the agents not to charge commissions on certain types of work obtained. A second aspect of the franchising system, under which the union charges a fee to agents who become franchised, is more troublesome. These fees ($200 for the initial franchise; $60 per year thereafter for each agent, and $40 for any sub-agent working in the office of another), are not segregated from other union funds. While the union argues that they are necessary to pay the union's expenses in administering the franchise system, no evidence was presented at trial to show that the union's costs justified the franchise fees.

Clearly the union could not, legally, exact more from the agents than it needs to offset the costs of the franchising system. Such exactions would be unconnected with any of the goals of national labor policy which justify the antitrust exemption for labor. Nevertheless, this case in its present posture can best be disposed of by approving the fees as they stand today. There was testimony that at least one full-time Equity employee was engaged in updating lists of franchised agents and correlating contracts with these lists. There was also testimony that approximately 200 theatrical agents or agencies are affected by the union practices under challenge. Assuming an average yearly charge of $60, Equity's franchising revenues would amount to approximately $12,000. Such a sum, plus initial franchise fees col-

lected during the year, cannot be incommensurate with Equity's expenses in maintaining a full-time employee to administer the system. In such circumstances, a remand to the district court would not serve any useful purpose.

Affirmed.

APPENDIX B

District Court Opinion Dismissing the Complaint

[B1]

H. A. Artists & Associates, Inc., S. T. E. Representation, Ltd., Don Buchwald & Associates, Inc., Marje Fields, Inc., Henderson/Hogan Agency, Inc., Joel Pitt, Ltd., Talent Representatives, Inc., D. M. I. Talent Associates, Ltd., Jean Thomas Agency, Inc., Bob Waters, Inc., William D. Cunningham & Associates, Inc., Tatrum, Robertson & Hughes, Inc., Monty Silver Agency, Inc., Lester Lewis Associates, Inc., Leaverton Associates, Ltd., Joe Jordan Talent Agency, Inc., Raglyn-Shamsky, Ltd., Ann Wright Representatives, Inc.,

Plaintiffs,

v.

Actors' Equity Association, an unincorporated association and Donald Grody,

Defendants.

No. 78 Civ. 2452

UNITED STATES DISTRICT COURT

S. D. New York

Oct. 24, 1979

• • • • •

[B2] * * *

Findings of Fact

Motley, *District Judge.*

Defendant Actors' Equity Association ("Actors' Equity") is a labor organization representing actors working in the legitimate theatre. Defendant Donald Grody ("Grody"), as Executive Secretary, is the chief executive officer of Actors' Equity. The plaintiffs are employment agencies located in New York City who operate as theatrical agents.

Actors' Equity has collective bargain agreements with most major theatrical producers in New York and elsewhere, with most off-Broadway producers, and with many other theatrical producers throughout the United States. The terms negotiated with various producer groups are the minimum terms and conditions of employment. An actor is free to negotiate salary or terms more favorable than those prescribed in the collective bargaining agreement, but neither the actor nor the producer is permitted to diminish the wages set forth in the relevant collective bargaining agreement.

Theatrical agents are independent contractors in the business of placing their actor clients in jobs with producers. Theatrical agents receive commissions, based on a percentage of earnings of the client, only if they succeed in obtaining employment for their clients.

Theatrical agents who operate in New York City are required to be licensed as employment agencies and are regulated by the Department of Consumer Affairs of New York City pursuant to article 11 of the General Business Law of the State of New York, which sets the maximum commissions employment agencies may charge and has specific provisions dealing with theatrical agents.

As a matter of general industry practice, producers seek actors and actresses for their productions through agents. Testimony in this case convincingly established that an actor without an agent does not have the same access to producers or the same opportunity to be seriously considered for a part as does an actor who has an agent. Even principal interviews, in which producers are required to interview all actors who want to be considered for principal roles, do not eliminate the need for an agent, who may have a greater chance of gaining an audition for his client.

Under Actors' Equity agency regulation system, agents are required to secure licenses, also known as permits or franchises, from Actors' Equity in order to represent Actors' Equity members. Licensed agents must abide by a schedule of maximum commissions established by Actors' Equity and must adhere to other rules designed to pro-
[B3] tect Actors' Equity members. Actors' Equity members are forbidden from dealing through agents who are not licensed by Actors' Equity, and members are subject to discipline for dealing with nonfranchised agents.

Theatrical Artists Representatives Association ("TARA") is a trade association of agents working in the legitimate theatre field. Discussions between Actors' Equity and TARA have resulted in several revisions in Actors' Equity regulations over the years. While holding an Actors' Equity franchise is a condition of membership in TARA, membership in TARA is not a condition to obtaining an Actors' Equity franchise.

Discussions between Actors' Equity and TARA in the 1950's resulted in the promulgation by Actors' Equity of "Rule A," which governed relations between Actors' Equity members and theatrical agents between 1958 and 1977. Rule A prescribed the minimum terms of contracts between actors and agents, including the maximum commissions which could be charged, the maximum duration for exclu-

sive contracts, and the conditions warranting release from an exclusive contract. Rule A also established procedures for the granting of franchises, the discipline of agents, and the arbitration of disputes under the agency regulations.

The current Actors' Equity agency regulations also resulted from discussions between Actors' Equity and TARA. The course of these discussions and related events follows.

Discussions between Actors' Equity and representatives of TARA commenced in or about 1975. In the course of the discussions, TARA gave six months notice to "terminate" Rule A; this termination date was extended several times by mutual consent.

A major subject of the discussions was Rule A's provision prohibiting agents from charging commissions on jobs paying the minimum scale salary provided for in the collective bargaining agreements between Actors' Equity and the producers. In addition, Rule A prohibited commissions on rehearsal pay, on pay for out of town expenses, and on "chorus" jobs. TARA demanded "10% from the first dollar," that is, a 10% commission on all monies received by the actor, regardless of whether the actor's salary exceeded the minimum scale. When Actors' Equity submitted to TARA a proposal that, while increasing commissions, did not meet this demand, TARA rejected the proposal and officially terminated Rule A on January 6, 1977. Agents who "resigned" their franchises pursuant to TARA's termination of Rule A were not permitted to represent Actors' Equity members except under pre-existing agency contracts. Rule A remained in effect for those agents who agreed to abide by it—these agents were permitted to represnt Actors' Equity members for all purposes.

As negotiations continued, Actors' Equity drafted a revised commission schedule and new agency regulations, known as the "Equity Agency Regulations." These regulations provided that an agent could charge a 10% commis-

sion, so long as that commission did not invade the negotiated minimum, that an agent could charge a commission on off-Broadway contracts, and that expense money negotiated by Actors' Equity was not commissionable.

In May, 1977, seven agents, including five who are plaintiffs herein, filed a lawsuit in the United States District Court for the Southern District of New York, challenging Actors' Equity's franchising system under the antitrust laws (*Hidden* v. *Actors' Equity Association*, 77 Civ. 2624 (JMC)). The lawsuit was initiated and financed by TARA.

The lawsuit was withdrawn without prejudice in August, 1977, and in or about October, 1977, TARA and Actors' Equity reached agreement on the new Equity Agency Regulations. Most agents then resumed their franchises and began complying with the current Equity Agency Regulations. The new Equity Agency Regulations prohibit commissions on minimum scale jobs, chorus jobs, rehearsal pay, and out-of-town expense money.

[B4] On or about August 31, 1977, a group of agents, including the plaintiffs, informed Actors' Equity that they had resigned from TARA and that they wished to be represented by the National Association of Talent Representatives, Inc. (NATR), a trade association whose members were talent agents representing actors. Most of the plaintiffs have not been franchised by Actors' Equity since January, 1977. Actors' Equity has invited plaintiffs to become refranchised, but plaintiffs have decided to remain unfranchised.

In order to enforce its rule that members deal only through franchised agents, Actors' Equity has advised members that they could be disciplined for dealing with nonfranchised agents. It was Actors' Equity's practice to send a letter to an actor dealing with a nonfranchised agent, warning the actor that he could be disciplined—a copy of the letter was also sent to the nonfranchised agent. In 1979,

Actors' Equity began disciplinary proceedings against members who were dealing with nonfranchised agents—members who would not agree to cease dealing with nonfranchised agents were fined after hearings.

The court finds, however, that Actors' Equity has not required producers to refrain from dealing with nonfranchised agents. While Actors' Equity requested producers not to deal with nonfranchised agents and notified producers that Actors' Equity members could be disciplined for dealing with nonfranchised agents, Actors' Equity never imposed or threatened to impose any sanctions on producers for dealing with nonfranchised agents. In June, 1978, Actors' Equity amended the language of Rule 2(A) in collective bargaining agreements between Actors' Equity and producers; the amendment clarified that actors were the only persons subject to any sanctions for dealing with nonfranchised agents.

Actors' Equity provides standard form individual employment contracts, which the actor and producer must sign when the actor becomes employed by a producer. These individual employment contracts provide blanks for identifying the parties to the contract (including the agent), the production, and essential terms such as the salary, the starting date, and the role to be played. In particular, in 1975 TARA requested Actors' Equity to add a line for identification of the agent into the standard form employment contract used under the "Production Contract" and used in Broadway shows. In 1977, Actors' Equity did print new standard form employment contracts containing a line for identification of the agent.

This court finds that producers were not, in fact, required to fill in the agent identification line on any of the standard form contracts. Producers could leave the agent's line blank, incurring no penalties or further inquiry from Actors' Equity. Even where Actors' Equity has had knowledge that

a producer has failed to identify an agent on the standard form employment contract, the evidence does not show that Actors' Equity has taken action against the producer. In fact, producers have frequently not identified nonfranchised agents on the contract, at the request of the agents.

In short, this court finds no evidence to suggest the existence of any conspiracy or illegal combination between Actors' Equity and TARA or between Actors' Equity and producers. The Actors' Equity franchising system was employed by Actors' Equity for the purpose of protecting the wages and working conditions of its members.

Conclusions of Law

Plaintiffs in this case allege that defendant Actors' Equity Association's ("Actors' Equity") franchising system and collective bargaining agreements violate Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 et seq. Defendants have raised the affirmative defense that defendants' conduct is protected under the statutory and nonstatutory exemptions to the antitrust laws. For the reasons stated below, this court concludes that defendants' conduct is protected under the statutory exemption to the antitrust laws, and accordingly, finds for defendants in this case.

[B5] Under Sections 6 and 20 of the Clayton Act, 15 U.S.C. § 17, 29 U.S.C. § 52, and under the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, labor unions are not combinations or conspiracies in restraint of trade; these statutes exempt specific union activities, including secondary picketing and boycotts, from operation of the antitrust laws. *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 621-22, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975). Under this statutory exemption from antitrust laws, the Supreme Court held in *United States* v. *Hutcheson,* 312 U.S. 219, 232, 61 S.Ct. 463, 466, 85 L.Ed. 788 (1941) [footnote omitted], that the activities of a labor organiza-

tion come within the exemption "[s]o long as a union acts in its self-interest and does not combine with non-labor groups."

In addition, the Supreme Court has fashioned a nonstatutory labor exemption from antitrust laws:

> The Court has recognized . . . that a proper accommodation between the congressional policy favoring collective bargaining under The NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. . . .
>
> The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions. Union success in organizing workers and standardizing wages ultimately will affect price competition among employers, but the goals of federal labor law never could be achieved if this effect on business competition were held a violation of the antitrust laws. The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions.

Connell Construction Co. v. *Plumbers & Steamfitters, supra,* 421 U.S. at 622, 95 S.Ct. at 1835 [citation omitted].

In distinguishing between the statutory and nonstatutory exemptions, the Supreme Court has noted that "while the statutory exemption allows unions to accomplish some restraints by acting unilaterally, . . . the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market." *Id.* at 622-23, 95 S.Ct. at 1835 [citation omitted].

This court need not decide whether the nonstatutory exemption is applicable in the case at hand, as this court concludes that the statutory exemption is directly applicable. In particular, this court concludes that under the Supreme Court's decision in *American Federation of Musicians* v. *Carroll,* 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460 (1968), the activities of the defendants are protected under the statutory exemption to antitrust laws.

As noted above, the Court in *United States* v. *Hutcheson* established a two pronged test for determining whether a labor organization's activity falls within the statutory exemption: 1) whether a union has combined with nonlabor groups, and 2) whether a union has acted in its self-interest. *See United States* v. *Hutcheson, supra,* 312 U.S. at 232, 61 S.Ct. 463. As interpreted by the Second Circuit, "[t]he test of whether labor union action is or is not within the prohibitions of the Sherman Act is (1) whether the action is in the union's self-interest in an area which is a proper subject of union concern and (2) whether the union is acting in combination with a group of employers." *Intercontinental Container Transport Corp.* v. *New York Shipping Assoc.,* 426 F.2d 884, 887 (2d Cir. 1970); *accord, Robertson* v. *National Basketball Assoc.,* 389 F.Supp. 867, 889 (S.D.N.Y.1975).

In *American Federation of Musicians* v. *Carrol, supra,* the Supreme Court introduced an "economic interrelationship" criterion in determining whether a union has combined with nonlabor groups—the first prong of the *Hutcheson* test:

> The criterion applied by the District Court in determining that the orchestra leaders were a "labor" group and parties [B6] to a "labor dispute" was the "presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent

> contractors were a 'labor group' and party to a labor dispute under the Norris-LaGuardia Act." . . . The Court of Appeals held, and we agree, that this is a correct statement of the applicable principles.

391 U.S. at 105-06, 88 S.Ct. at 1567 [citation omitted]. The Supreme Court in *Carroll* found that the economic interrelationship criterion had been satisfied, in light of the district court's finding that "the orchestra leaders performed work and functions which actually or potentially affected the hours, wages, job security, and working conditions of [the union's] members." *Id.* at 106, 88 S.Ct. at 1567 [footnote omitted].

The Court in *Carroll* specifically addressed the applicability of the "economic interrelationship" criterion to the union's regulation of booking agents:

We think also that the caterer and booking agent restrictions "are at least as intimately bound up with the subject of wages," . . . as the price floors. The District Court found that the booking agent regulations were adopted because of experience that "many booking agents charged exorbitant fees to members and booked engagements for musicians at wages which were below union scale." . . . On the basis of these findings, the District Court concluded:

> "Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of [the unions], I find that they are in an economic interrelationship with the members * * * such that the [unions] are justified in regulating their activities * * * Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale and working conditions."

Id. at 113, 88 S.Ct. at 1571 [bracketed material in original].

In applying the second prong of the *Hutcheson* test, the

Court did not specifically inquire whether the union's activity was in its own "self-interest." Instead, the *Carroll* Court appeared to use several interchangeable tests to determine whether the union's activity actually protected the wages, hours, or working conditions of union members. *See Adams, Ray & Rosenberg* v. *William Morris Agency,* 411 F.Supp. 403, 409-10 (C.D. Cal. 1976). Thus, the Court seemingly applied the following tests:

1) whether "the union has a legitimate interest" (391 U.S. at 107, 88 S.Ct. at 1568);

2) whether the activities "in actuality operate to protect the wages" (*Id.* at 108, 88 S.Ct. at 1568);

3) whether the activities "were expressly designed to and did function as a protection of * * * wage scales" (*Id.* at 108, 88 S.Ct. at 1568);

4) whether activities "are simply a means for coping with the job and wage competition . . . to protect the wage scales" (*Id.* at 109, 88 S.Ct. at 1569);

5) whether the activites bear "a close relation to labor's efforts to improve working conditions" (*Id.*);

6) whether the activities are "a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure" (*Id.* at 110, 88 S.Ct. at 1569);

7) whether the activities are "intimately bound up with the subject wages" (*Id.* at 113, 88 S.Ct. at 1571); and

8) whether the activities are "reasonably related to their interest in maintaining observance of union scale wages and working conditions" (*Id.*).

Thus, the Court in *Carroll* apparently was satisfied that the union's activities in that case were in the union's self-

interest. The Court's analysis in *Carroll* was perhaps best characterized by the district court in *Adams, Ray & Rosenberg* v. *William Morris Agency, supra,* at 410:

> [B7] It thus appears that the test to determine if a union's actions are in its "self-interest" has not been precisely formulated. But the principle that emerges from the relevant cases is that a union's acts are in its "self-interest," that term is used in *Hutcheson,* if they bear a reasonable relationship to a legitimate union interest.

This court concludes that, under the standards set forth in *Hutcheson* and *Carroll,* defendants' activities clearly fall within the statutory labor exemption to antitrust laws. First, it is clear that the defendant Actors' Equity has not combined with nonlabor groups, as there is an economic interrelationship between Actors' Equity and the agents alleged by plaintiffs to be a "nonlabor group." In light of this economic interrelationship affecting the legitimate union interests of Actors' Equity, the agents were a "labor group" and party to a "labor dispute," thus falling within the statutory labor exemption to antitrust laws.

The record in this case leaves little doubt as to the economic interrelationship between the members of Actors' Equity and the agents. Testimony confirmed that agents play an integral role in the industry; without an agent, an actor would have significantly less chances of gaining employment. The evidence clearly supports the conclusion that agents perform work and functions which actually or potentially affect the wages, job security, and working conditions of Actors' Equity members. As in *Carroll,* the agents in this case have a direct and substantial effect on the wages of union members. In short, defendants have convincingly demonstrated an economic interrelationship

between agents and Actors' Equity members, and accordingly, the first prong of the *Hutcheson* test is satisfied.

Defendants have satisfied the second prong of the *Hutcheson* test as well. The regulations imposed by Actors' Equity upon its members are without doubt designed to protect union wage scales. Both franchising of agents and the restrictions on agents' commissions operate to protect wage scales; as in *Carroll,* these union activities are "a direct and frontal attack upon a problem thought to threaten the maintenance of the basic wage structure." In short, this court finds that the activities of Actors' Equity bear a reasonable relationship to legitimate union interests—union scale wages and working conditions.

Plaintiffs have offered a number of theories in their attempt to distinguish the case at hand from *Carroll.* First, plaintiffs argue that in *Carroll* the union members did not have a collective bargaining agreement with employers, such as the "father of the bride," while in the case at hand Actors' Equity has collective bargaining agreements with most of the employers of its members. This argument is of no avail, however, as Actors' Equity has a legitimate union interest in protecting its members' wages and working conditions, even beyond whatever protection is already afforded by collective bargaining agreements. Moreover, the Court's holding in *Carroll* was in no way limited to those instances where union members were not employed under collective bargaining agreements.

Second, plaintiffs argue that in *Carroll* the orchestra leaders were in competition with union members for jobs, while in the case at hand agents are not in competition with members of Actors' Equity. Plaintiffs' argument seriously misconstrues *Carroll,* unjustifiably limiting its holding to cases involving competition between union members and the alleged "nonlabor" group. In fact, *Carroll*

explicitly applies where there is the "presence of a job or wage competition *or* some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." 391 U.S. at 105-06, 88 S.Ct. at 1567 [emphasis added]. Plaintiffs' assertion that the term "economic interrelationship is to be narrowly construed to cover situations involving actual competition is without support; the plain meaning of the Court's language in *Carroll* is that an economic interrelationship affecting legitimate union interests between Actors' Equity members and their agents will [B8] suffice. This court recently stated in *Robert Redfield, d/b/a The Redfield Agency* v. *American Federation of Musicians of the United States and Canada AFL-CIO,* 71 Civ. 3091 (S.D.N.Y Sept. 18, 1978):

> Plaintiff argues that *Carroll* does not apply to professional booking agents such as plaintiff, but only to booking agents who also work as orchestra leaders, as did the plaintiffs in *Carroll.* Neither the language nor the rationale of *Carroll* limits its holding to cases where the booking agent is also an orchestra leader.

In short, this court concludes that *Carroll's* economic interrelationship criterion is not limited to cases involving actual competition.

Third, plaintiffs argue that in *Carroll* booking agents apparently were not licensed or regulated by any government agency, while in the case at hand agents are licensed by the Department of Consumer Affairs of New York City and are comprehensively regulated pursuant to article 11 of the General Business Law of the State of New York. Plaintiffs' argument would perhaps carry some force, if in fact the New York licensing and regulation afforded members of Actors' Equity the same protection as the union activities in question. However, it is clear

that Actors' Equity is attempting to afford protection beyond that of New York law, both by protecting members who work outside of New York and by affording protection much more comprehensive than that of New York law. The existence of protection under New York law should not preclude union attempts to protect further the interests of union members.

Fourth, plaintiffs argue that in *Carroll* the licensing provisions in question were enacted unilaterally by the union, while in the case at hand the franchising provisions were "part of a sweetheart deal to benefit TARA to the exclusion of other agents" and "part of a larger combination and conspiracy in violation of the antitrust laws." As this court's findings of fact indicate, plaintiff has not successfully demonstrated the existence of any such sweetheart deal or conspiracy. Plaintiffs have not demonstrated that Actors' Equity's regulation of agents was either applied in a discriminatory fashion favoring TARA agents or was designed to operate to the advantage of TARA agents. While TARA did request Actors' Equity to enforce the rule that Actors' Equity members may not deal with nonfranchised agents, this could hardly be a conspiracy against the plaintiffs, as the plaintiffs were TARA members at the time. Nor is TARA's agreement to Actors' Equity's increase of franchise fees sufficient evidence of conspiracy.

In cases where a plaintiff alleges a conspiracy in violation of the Sherman Act against a union, the plaintiff must meet the "clear proof" standard of proof. *Ramsey* v. *United Mine Workers of America,* 416 F.2d 655, 661-63 (6th Cir. 1969). In the case at hand, plaintiff has met neither the "clear proof" standard nor the more usually applicable "preponderance of the evidence" standard in its attempt to demonstrate a conspiracy between TARA and Actors' Equity.

Fifth, plaintiffs argue that in the case at hand producers conspired with Actors' Equity to not deal with nonfranchised agents. In support of this contention plaintiffs offered hearsay evidence consisting of testimony by plaintiffs' witnesses as to statements made by producers allegedly in furtherance of the conspiracy. This court took the testimony subject to proof by plaintiffs with independent evidence of the existence of such a conspiracy. The court reserved decision on defendants' subsequent motions to strike the hearsay testimony. Upon careful consideration of the record, this court now grants defendants' motion to strike, as plaintiffs have failed to prove with independent evidence the existence of any conspiracy. While this court's findings of fact discuss in detail the independent evidence allegedly establishing the existence of a conspiracy, a brief recapitulation is in order.

While Actors' Equity did request producers to refrain from dealing with nonfranchised agents, plaintiffs have not demonstrated that Actors' Equity required pro-[B9] ducers to refrain from dealing with nonfranchised agents. Such requests certainly do not suffice to demonstrate the existence of a conspiracy. Nor do Actors' Equity's restrictions upon its own members constitute a conspiracy. Finally, plaintiffs have not successfully demonstrated a conspiracy resulting from the alleged requirement of Actors' Equity that producers identify the agent of record on the standard form individual employment contracts. In summary, as the plaintiff has failed to demonstrate with independent evidence the existence of a conspiracy between Actors' Equity and producers, the hearsay evidence as to statements of producers must be struck from the record.

Finally, plaintiffs argue that the restrictions imposed by Actors' Equity's franchising system do not further any legitimate labor objective. In particular, plaintiffs focus

their challenge upon several features of the franchising system. Plaintiffs object to the prohibition of commissions on scale wage jobs, chorus jobs, out-of-town expense money, and rehearsal wages. Plaintiffs' assertion that commissions affect an actor's disposable income but do not affect wages is unpersuasive. This court concludes that, under the facts of this case, commissions on these items are intimately bound with the subject of wage scales. Unlike theatre ticket prices, photographers' fees, commuting costs, or grocery prices, commissions are directly and proportionately related to wages.

Plaintiffs also object to the requirement that agents pay fees in order to be franchised. This court is of the opinion that the franchise fees are reasonably related to the operation of the franchise system and the system's protection of wage scales and working conditions. While conceivably Actors' Equity might someday decide to charge a fee so high as to not be reasonably related to the operation of the franchise system and its goals, the facts before this court do not present that situation. In summary, this court finds that the franchising system of Actors' Equity is reasonably related to legitimate labor objectives.

Since this court concludes that defendants' activities are protected under the statutory labor exemption to antitrust laws, it is unnecessary to address several issues presented by defendants: whether Actors' Equity's regulations are unreasonable restraints of trade, whether plaintiffs are barred by their conduct from obtaining equitable relief, and whether an action can be maintained against defendant Grody in his individual capacity.

This court concludes that defendant Actors' Equity acted in its own self-interest concerning matters intimately bound with wage scales and working conditions, and without conspiring or combining with any nonlabor group. Accord-

ingly, defendants are protected by the statutory exemption from antitrust laws. This court finds that the complaint in this action should be dismissed and judgment entered for defendants.

So ordered.

APPENDIX C

Second Circuit Affirmance of District Court's Denial of a Motion for Preliminary Injunction

[C1]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of November, one thousand nine hundred and seventy-eight.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge,

HON. WALTER R. MANSFIELD,
HON. THOMAS J. MESKILL,
Circuit Judges.

H. A. ARTISTS & ASSOCIATES, INC., S.T.E. REPRESENTATION LTD., J. MICHAEL BLOOM, LTD., DON BUCHWALD & ASSOCIATES, INC., MARJE FIELDS, INC., HENDERSON HOGAN AGENCY INC., OPPENHEIM-CHRISTIE ASSOCIATES LTD., JOEL PITT LTD., TALENT REPRESENTATIVES INC., D.M.I. TALENT ASSOCIATES, LTD., JEAN THOMAS AGENCY, INC., BOB WATERS AGENCY, INC., JACOBSON-WILDER, INC., WILLIAM D. CUNNINGHAM & ASSOCIATES, INC., TRANUM ROBERTSON & HUGHES, INC., MONTY SILVER AGENCY, LTD., BRET ADAMS, LIMITED, MICHAEL THOMAS AGENCY, INC., LESTER LEWIS

ASSOCIATES, INC., LEAVERTON ASSOCIATES LTD., JOE JORDAN TALENT AGENCY, INC., RAGLYN-SHAMSKY, LTD., ANN WRIGHT REPRESENTATIVES, INC.,

Plaintiffs-Appellants,

v.

ACTORS EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appellants allege that Equity has unlawfully conspired with producers to prevent them from representing actors because appellants refuse to comply with Equity's franchising regulations and sought a preliminary injunction which Judge Motley denied.

To merit a preliminary injunction, "the plaintiffs must prove that they are likely to succeed on the merits and they are suffering irreparable injury, or they must prove that they have shown serious questions going to the merits and a balance of hardships tipping decidedly towards them." *Sonesta International Hotels Corp.* v. *Wellington Associates,* 483 F.2d 247, 250 (2d Cir. 1973).

[C2] Equity has offered to re-franchise appellants *pendente lite.* Trial has been set for February, 1979. By temporarily submitting, albeit under protest, to Equity's longstanding regulations until a disposition on the merits can be reached, appellants can avoid the economic and professional injury they might otherwise suffer as a result of the al-

legedly illegal franchising and "blacklisting" procedures enforced by Equity.

Thus, appellants have failed to demonstrate the requisite irreparable injury or balance of hardships. "[A] district court's denial of preliminary relief is usually subject to reversal only in the case of a clear abuse of discretion. . . ." *National Association of Letter Carriers* v. *Sombrotto,* 449 F.2d 915, 921 (2d Cir. 1971); Moore's Federal Practice, ¶ 65.04[1]. No such abuse of discretion has been demonstrated.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

/s/ IRVING R. KAUFMAN,
Chief Judge,

/s/ WALTER R. MANSFIELD,
/s/ THOMAS J. MESKILL,
Circuit Judges.

APPENDIX D

District Court's Denial of Motion for Preliminary Injunction

[D1]

SOUTHERN DISTRICT OF NEW YORK

78 Civ. 2452

H.A. ARTISTS & ASSOCIATES, INC. et al.,

Plaintiffs,

—against—

ACTORS EQUITY ASSOCIATION, etc., et al.,

Defendants.

• • •

[D2] *Findings of Fact and Conclusions of Law*

Plaintiffs are theatrical agents who are suing Actor's Equity Association (Equity) under the federal antitrust statutes. Plaintiffs have moved for a preliminary injunction. This request is denied. See order signed this date.

Plaintiffs seek to enjoin Equity's enforcement of its rule that Equity members may not deal with agents who do not comply with Equity regulations for agents. These regulations, known as Rule A, limit the fee that agents can charge an actor. Equity also requires that agents be franchised by Equity and pay Equity a small franchise fee. Equity has entered into a collective bargaining agreement with the producers who hire the actors. As part of that collective bargaining agreement, a producer is required to send Equity a copy of any contract it makes with an actor. That contract must specify the actor's agent. In the event that

Equity finds that an actor is using a nonfranchised agent, such as one of the plaintiffs here, Equity may discipline the actor. Equity also notifies the producers of the names of the agents who are not franchised by Equity. Equity has had this system in effect for some fifty years, as have other performers' unions.

[D3] In order to obtain a preliminary injunction the plaintiffs must prove that they are likely to succeed on the merits and they are suffering irreparable injury, or they must prove that they have shown serious questions going to the merits and a balance of hardships tipping decidedly towards them. *Sonesta Int'l Hotels Corp.* v. *Wellington Associates*, 483 F. 2d 247, 250 (2d Cir. 1973).

In order to show a likelihood of success on the merits here the plaintiffs must show a likelihood that Equity's actions are not immune from the antitrust laws under the labor exemption. Title 15, U.S.C. §17 states:

> *Antitrust laws not applicable to labor organizations*
>
> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held . . . to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

See also 29 U.S.C. §§101-115, 15 U.S.C. §52.

A union is not exempt from the antitrust laws if it combines with a non-labor group or if its actions are not taken

in its own self-interest. *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 635 (1975). The [D4] court finds that plaintiffs have not shown a likelihood that Equity's actions falls into either of these two areas which are outside the labor exemption.

In *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1968), the Supreme Court held that a musicians' union's regulation of booking agents and of food caterers was exempt from the federal antitrust laws because the agents and caterers were in an "economic interrelationship" with the members of the musicians' union such that the agents and caterers were part of a labor group and were involved in a labor dispute with the union. The Court also found that the regulations were reasonably related to the union's interest in maintaining wages and conditions for its members. *See also Garrett* v. *American Federation of Musicians*, 98 L.R.R.M. 2078 (D.S.C. 1978) (upheld musicians' union's regulations of booking agents and circulation of "unfair" list of agents who did not comply with union rules); *Adams, Ray & Rosenberg* v. *William Morris Agency*, 411 F. Supp. 403 (C.D. Ca. 1976) (denial of a preliminary injunction against writers' union's regulation of agents, on the ground that *Carroll* was likely to control).

In *Carroll, supra*, the court also upheld the union's practice, similar to Equity's practice, of gather-[D5]ing information about agents by requiring that all contracts, which included the name of the agent, be filed with the union.

Plaintiffs contend that Equity has "blacklisted" the non-franchised agents by notifying the producers that actors will be subject to discipline if they violate Equity's rules with respect to employment of non-franchised agents. The letter cited by plaintiffs does not support their contention that the producers were solicited to blacklist the plaintiffs.

Plaintiffs have not shown that Equity was doing anything more than disseminating information to the producers.

While the question whether the agents and actors are in an economic relationship such that they are in a labor dispute, and the question whether the regulations are in Equity's reasonable self-interest are questions for trial, plaintiffs have not made a sufficient showing to overcome the likelihood that Equity's actions will be exempt from the federal antitrust laws under the labor exemption.

Therefore, plaintiffs' request for a preliminary injunction enjoining the operation of Equity's regulation of agents is denied.

Dated: June 29, 1978

New York, New York

CONSTANCE BAKER MOTLEY
U.S.D.J.

APPENDIX E

Clayton Act §20, 29 U.S.C. §52

[E1]

Sec. 20. That no restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between persons employed and persons seeking employment involving, or growing out of, a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney.

And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing at patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to, or withholding from, any person engaged in such dispute, any strike benefits or other monies or things of value; or from peaceably assembling in a lawful manner, and for lawful

purpose; or from doing any act or thing [E-2] which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States.

APPENDIX F

Sections 5—15 of the Norris—LaGuardia Act (29 U.S.C. §§105-115)

[F1]

§ 105. *Doing in concert of certain acts as constituting unlawful combination or conspiracy subjecting person to injunctive remedies*

No court of the United States shall have jurisdiction to issue a restraining order or temporary or permanent injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 104 of this title.

Mar. 23, 1932, c. 90, § 5, 47 Stat. 71.

§ 106. *Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents*

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

F1 *(continued)* — F2

§ 107. *Issuance of injunctions in labor disputes; hearing; findings of court; notice to affected persons; temporary restraining order; undertakings*

No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as defined in this chapter, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

[F2] (d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court shall

direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: *Provided, however,* That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking mentioned in this section shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing in this section contained shall deprive any party having a claim or cause of action under or upon such under-

taking from electing to pursue his ordinary remedy by suit at law or in equity.

Mar. 23, 1932, c. 90, § 7, 47 Stat. 71.

§ 108. *Noncompliance with obligations involved in labor disputes or failure to settle by negotiation or arbitration as preventing injunctive relief*

No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute ei-[F3]ther by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration.

Mar. 23, 1932, c. 90, § 8, 47 Stat. 72.

§ 109. *Granting of restraining order or injunction as dependent on previous findings of fact; limitation on prohibitions included in restraining orders and injunctions*

No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided in this chapter.

Mar. 23, 1932, c. 90, § 9, 47 Stat. 72.

§ 110. *Review by Court of Appeals of issuance or denial of temporary injunctions; record; precedence*

Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the court of appeals for its review. Upon the filing of such record in the court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character.

Mar. 23, 1932, c. 90, § 10, 47 Stat. 72; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

§§ 111, 112. *Repealed. June 25, 1948, c. 645, § 21, 62 Stat. 862, eff. Sept. 1, 1948*

§ 113. *Definitions of terms and words used in chapter*

When used in this chapter, and for the purposes of this chapter—

(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or [F4] who are members of the same or an affiliated organization of employers or employees; whether such dispute is-(1) between one or more employers or associations of employers and one or more employees or associations of employees; (2) between

one or more employers or associations of employers and one or more employers or associations of employers; or (3) between one or more employees or associations of employees and one or more employees or associations of employees; or when the case involves any conflicting or competing interests in a "labor dispute" (as defined in this section) of "persons participating or interested" therein (as defined in this section).

(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation.

(c) The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

(d) The term "court of the United States" means any court of the United States whose jurisdiction has been or may be conferred or defined or limited by Act of Congress, including the courts of the District of Columbia.

Mar. 23, 1932, c. 90, § 13, 47 Stat. 73.

§ 114. *Separability of provisions*

If any provision of this chapter or the application thereof to any person or circumstance is held unconstitutional or otherwise invalid, the remaining provisions of this chap-

ter and the application of such provisions to other persons or circumstances shall not be affected thereby.

Mar. 23, 1932, c. 90, § 14, 47 Stat. 73.

§ 115. *Repeal of conflicting acts*

All acts and parts of acts in conflict with the provisions of this chapter are repealed.

Mar. 23, 1932, c. 90, § 15, 47 Stat. 73.

APPENDIX G

General Business Law of the State of New York, Article 11

[G1]

§180. *Theatrical employment; financial investigations and security*

A theatrical employment agent shall investigate whether or not any employer (person, firm or corporation) who is offering employment to an applicant for employment has defaulted in the payment of salaries, fees or other compensation to any performer or group of performers or has left stranded any performing companies or individuals or groups, during the five years preceding the date of the application. An agent shall not procure or undertake to procure employment or engagements on the part of any performer or groups of performers for an employer who has failed to pay salaries, fees or other compensation, or who has left stranded any performer or groups of performers or any performing companies or individuals during the five years preceding the date of the application, unless such employer (person, firm or corporation) shall provide sufficient security for the direct benefit of the performer or performers and in an amount ample to pay the performer or performers their full compensation for the special employment or engagement designated in the employment or engagement contract. The provisions of this section shall not apply to employment or engagements in modeling.

§183. *Theatrical employment; contracts*

Every licensed person who shall procure for or offer to an applicant a theatrical engagement shall have executed

in duplicate a contract or deliver to the parties as herein set forth [G2] a statement containing the name and address of the applicant; the name and address of the employer of the applicant and of the person acting for such employer in employing such applicant; the time and duration of such engagement; the amount to be paid to such applicant; the character of entertainment to be given or service to be rendered; the number of performances per day or per week that are to be given by said applicant; if a vaudeville engagement, the name of the person by whom the transportation is to be paid, and if by the applicant, either the cost of transportation between the places where said entertainment or services are to be given or rendered, or the average cost of transportation between the places where such services are to be given or rendered; and if a dramatic engagement the cost of transportation to the place where the services begin if paid by the applicant; and the gross commission or fees to be paid by said applicant and to whom. Such contracts or statements shall contain no other conditions and provisions except such as are equitable between the parties thereto and do not constitute an unreasonable restriction of business. Forms of such contract and statement in blank shall be first approved by the commissioner and his determination shall be reviewable by certiorari. One of such duplicate contracts or of such statements shall be delivered to the person engaging the applicant and the other shall be retained by the applicant. The licensed person procuring such engagement for such applicant shall keep on file or enter in a book provided for that purpose a copy of such contract or statement.

[G3] § 185. *Fees*

1. Circumstances permitting fee. An employment agency shall not charge or accept a fee or other consideration un-

less in accordance with the terms of a written contract with a job applicant, except for class "A" and "A1" employment, and except after such agency has been responsible for referring such job applicant to an employer or such employer to a job applicant and where as a result thereof such job applicant has been employed by such employer. The maximum fees provided for herein for all types of placements or employment may be charged to the job applicant and a similar fee may be charged to the employer. By agreement with an employment agency, the employee may voluntarily assume payment of the job applicant's fee. The fees charged to employers by any licensed person conducting an employment agency for rendering services in connection with, or for providing employment in classes "A", "A1", and "B", as hereinafter defined in subdivision four of this section where the applicant is not charged a fee shall be determined by agreement between the employer and the employment agency. No fee shall be charged or accepted for the registration of applicants for employees or employment.

2. Size of fee; payment schedule. The gross fee charged to the job applicant and the gross fee charged to the employer each shall not exceed the amounts enumerated in the schedule set forth in this section, for any single employment or engagement, except as hereinabove provided; and such fees shall be subject to the provisions of section one hundred eighty-six of this article. Except as otherwise provided herein, an employment agency shall [G4] not require an applicant, while employed in the continental United States, and paid weekly, to pay any fee at a rate greater than in six equal weekly installments each of which shall be payable at the end of each of the six weeks of employment or, if paid less frequently, in three equal installments, each of which shall be payable at the end of the first

three pay periods following his employment, or within a period of six weeks, whichever period is shorter. An employer's fee shall be due and payable at the time the applicant begins employment, unless otherwise determined by agreement between the employer and the agency.

3. Deposits, advance fees. Notwithstanding any other provisions of this section, an employment agency may not require a deposit or advance fee from any applicant except an applicant for class "A" or class "A1" employment, and only to the extent of the maximum fees hereinafter provided. Such deposit or advance fee shall be offset against any fee charged or accepted when such employment is obtained. Any excess above the lawful fee shall be returned without demand therefor, immediately after the employment agency has been notified that such employment has been obtained; and all of such deposit or advance fee shall be returned immediately upon demand therefor, if at the time of the demand such employment has not been obtained.

4. Types of employment. For the purpose of placing a ceiling over the fees charged by persons conducting employment agencies, types of employment shall be classified as follows:

Class "A"—domestics, household employees, unskilled [G5] or untrained manual workers and laborers, including agricultural workers;

Class "A1"—nonprofessional trained or skilled industrial workers or mechanics;

Class "B"—commercial, clerical, executive, administrative and professional employment, all employment outside the continental United States, and all other employment not included in classes "A", "A1", "C" and "D";

Class "C"—theatrical engagements;

Class "D"—nursing engagements as defined in article one hundred thirty-nine of the education law.

5. Fee ceiling. For a placement in class "A" employment the gross fee, including the deposit if any, shall not exceed, in percentage of the first full month's salary or wages, the following:

where no meals or lodging are provided	10%
where one meal per working day is provided	12%
where two meals per working day are provided	14%
where three meals and lodging per working day are provided	18%

Where all parties to the employment agreement understand or agree at the time the employment is entered into that it shall be for a period shorter than one month, the gross fee shall not exceed ten per cent, twelve per cent, fourteen per cent or eighteen per cent respectively of the salary or wages actually paid.

6. Fee ceiling. For a placement in Class "A1" employment the gross fee shall not exceed one week's wages where all parties to the employment agreement understand or agree at the time [G6] the employment is entered into that it shall be for a period for ten weeks or more. Where all parties to the employment contract agree and understand at the time the employment contract is entered into that it shall be for a period shorter than ten weeks, the gross fee shall not exceed ten per cent of the wages or salary actually received.

7. Fee ceiling. For a placement in Class "B" employment the gross fee shall not exceed, in percentage of the first full month's salary or wages, the following:

where such first full month's salary or wages is

less than $225	25%
at least $225 but less than $270	35%
at least $270 but less than $300	40%
at least $300 but less than $330	45%
at least $330 but less than $365	50%
at least $365 but less than $400	55%
at least $400 or more	60%

Provided however, that where the placement is for employment in which the applicant will be paid on a straight commission basis or on the basis of a drawing account plus commissions, the gross fee shall be based on percentages in the above schedule applied to an amount equivalent to one-twelfth of the estimated first year's earnings, as estimated by the employer.

Where all parties to the employment contract agree and understand at the time the employment contract is entered into that it shall be for a period shorter than four months the gross fee shall not exceed fifty per cent of the fee prescribed in the schedule in this subdivision or ten per cent of the wages or salary actually received, whichever is less.

[G7] 8. Fee ceiling. For a placement in class "C" employment the gross fee shall not exceed, for a single engagement, ten per cent of the compensation payable to the applicant, except that for employment or engagements for orchestras and for employment or engagements in the opera and concert fields such fees shall not exceed twenty per cent of the compensation.

9. Fee ceiling. For a placement in class "D" employment the gross fee shall not exceed, for a single engagement, the following:

(1) for private nursing duty, five per cent of the salary or wages received each week through the first ten weeks of that engagement only, and such fee shall be due and payable at the end of each such week;

(2) for any other nursing duty, the amount of the first week's salary or wages unless the first year's computed salary or wages to be derived for at least one year's employment is twenty-five hundred dollars or more, in which event the gross fee shall not exceed, in percentage of such salary or wages, the following:

where such first year's salary or wages is:

at least $2500 but less than $3000	2½%
at least $3000 but less than $3500	3%
at least $3500 but less than $4000	3½%
at least $4000 but less than $4500	4%
at least $4500 but less than $5000	4½%
$5000 or more	5%

IN THE

DEC 31 1980

Supreme Court of the United States

October Term, 1980

No. 80-348

H.A. ARTISTS & ASSOCIATES, INC.; S.T.E. REPRESENTATION LTD.; J. MICHAEL BLOOM, LTD.; DON BUCHWALD & ASSOCIATES, INC.; MARJE FIELDS, INC.; HENDERSON/HOGAN AGENCY INC.; OPPENHEIM-CHRISTIE ASSOCIATES LTD.; JOEL PITT LTD.; TALENT REPRESENTATIVES INC.; D.M.I. TALENT ASSOCIATES, LTD.; JEAN THOMAS AGENCY, INC.; BOB WATERS AGENCY, INC.; JACOBSON-WILDER, INC.; WILLIAM D. CUNNINGHAM & ASSOCIATES, INC.; TRANUM ROBERTSON & HUGHES, INC.; MONTY SILVER AGENCY LTD.; BRET ADAMS, LIMITED; MICHAEL THOMAS AGENCY, INC.; LESTER LEWIS ASSOCIATES, INC.; LEAVERTON ASSOCIATES LTD.; JOE JORDAN TALENT AGENCY INC.; RAGLYN-SHAMSKY, LTD.; ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

v.

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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Petition for Certiorari Filed August 21, 1980
Certiorari Granted November 17, 1980

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May 26, 1978 - Petitioners' complaint filed in the United States District Court For The Southern District Of New York.

May 31, 1978 - Petitioners' motion for a preliinary injunction filed in the District Court.

June 22, 1978 - Hearing in the District Court with respect to petitioners' motion for a preliminary injunction.

June 27, 1978 - Respondents' answer filed in the District Court.

June 29, 1978 - Order and Opinion of the District Court denying petitioners' motion for a preliminary injunction.

July 12, 1978 - Petitioners' notice of appeal to the United States Court Of Appeals For The Second Circuit from the Order and Opinion of the District Court denying petitioners' motion for a preliminary injunction filed.

November 22, 1978 - Respondents' amended answer filed.

November 9, 1978 - Order and Opinion of the Court Of Appeals affirming the Order and Opinion of the District Court denying petitioners' motion for a preliminary injunction.

May 24, 1979 - Joint Pre-trial Order filed in the District Court.

June 21, 25, 26, 28 and August 7 and September 28, 1979 - Trial of the action in the District Court.

October 24, 1979 - Opinion of the District Court dismissing petitioners' complaint.

October 29, 1979 - Judgment dismissing petitioners' complaint.

November 21, 1979 - Petitioners' notice of appeal from the October 24, 1979 Opinion of the District Court filed.

November 29, 1979 - Petitioners' amended notice of appeal from the October 29, 1979 Judgment of the District Court filed.

May 23, 1980 - Opinion of the Court of Appeals affirming the Opinion of the District Court dismissing petitioners' complaint.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

COMPLAINT (78 CIV. 2452 (CBM))

Plaintiffs, for their complaint, allege as follows:

1. This action for injunctive relief arises out of defendants' violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2). This Court's jurisdiction over the subject matter of this action rests on Section 16 of the Clayton Act (15 U.S.C. §26).

2. Each defendant inhabits, maintains an office, transacts business, or may be found within the Southern District of New York. The interstate trade and commerce involved and affected by the hereinafter-mentioned violations of the antitrust laws has been and still is carried on in part within the Southern District of New York.

DEFINITIONS

3. As used herein the term:

A. "Equity" shall refer to defendant Actors Equity Association;

B. "Member" shall refer to a member of Equity;

C. "Actor" shall include actors, actresses, performers, entertainers, and anyone else who performs in live legitimate theatrical productions such as plays and revues;

D. "Theatrical agent" includes any person or entity engaged in the business of obtaining employment for actors in live legitimate theatrical productions and rendering related services to actors;

E. "Franchised agent" shall mean a theatrical agent who is franchised by Equity to perform services for members;

F. "Nonfranchised agent" shall mean a theatrical agent who is not franchised by Equity;

G. "Producer" shall include any person or entity engaged in the business of producing live legitimate theatrical productions on Broadway, off Broadway, at dinner theatres, in summer stock, at industrial shows and elsewhere.

PARTIES

4. Each plaintiff is a theatrical agent having a place of business and doing business in the city, county and state of New York.

5. At all relevant times, defendant Equity has been an unincorporated association, functioning in part as a labor union on behalf of those of its members who perform in legitimate theatrical productions, with its principal place of

business at 1500 Broadway, New York, New York. Since at least 1940, virtually all persons who have regularly performed in legitimate theatrical productions in the United States have been or become members of Equity and virtually all producers have been parties to collective bargaining agreements with Equity. Each plaintiff has a substantial number of clients who are members of Equity and who have performed in legitimate theatrical productions. At present, Equity has approximately 11,000 members.

6. Defendant Donald Grody has been and is the Executive Director of Equity. Upon information and belief, Mr. Grody resides in the city, state and county of New York.

CO-CONSPIRATORS

7. Persons not made defendants herein have participated as co-conspir-

ators with Equity in the offenses alleged in this complaint and performed acts and made statements in furtherance of said offenses. Such co-conspirators include, but are not limited to:

A. Theatrical Artists Representatives Association, Inc. ("TARA"). TARA is, and at all pertinent times has been, an association of theatrical agents;

B. All franchised agents;

C. All favored nonfranchised agents whom Equity allows to perform theatrical agency services without interference;

D. All producers whom Equity has coerced, threatened or attempted to coerce or threaten, to refuse to deal with nonfranchised agents or who have supplied Equity with the

identity of an agent representing a member:

TRADE AND COMMERCE

8. In the United States, there is and has been for many years a separate national market and various regional submarkets for legitimate theatrical productions. Such productions are performed in numerous cities throughout the country. The largest submarket exists in New York City, where such performances are presented on and off Broadway. Live theatrical performances have also been presented by summer stock groups, dinner theatres and have been sponsored by industrial corporations. Numerous persons travel over state lines to attend the foregoing legitimate theatrical productions and actors and companies of actors travel in interstate commerce to

perform in said productions. Plaintiffs and other theatrical agents obtain employment for their actor-clients throughout the United States.

9. From at least 1940 to the present, Equity has been a party to collective bargaining agreements with virtually all producers in the United States. Since at least 1960, Equity has entered into collective bargaining agreements with the following associations, which represent producers in the following fields:

Association	Field
League of New York Theatres	Broadway productions
League of Off-Broadway Theatres	Off-Broadway productions
Council of Stock Theatres	Non-resident stock dramati productions
Council of Resident Stock Theatres	Resident stock dramatic productions
League of Resident Theatres	Resident repertory theatre productions

American Dinner Theatre Institute	Dinner theatre productions
Musical Theatre Association	Indoor musical productions
Association of Civic Musical Theatres	Outdoor musical stock productions

10. Equity's collective bargaining agreements with the above-described associations of producers contain provisions, among others, to the following effect:

A. producers, with limited exceptions, agree only to employ actors who are or become members of Equity;

B. producers agree not to deal with agents who are not franchised by Equity in these precise or substantially similar terms:

> "The producer has notice that if the negotiation for, or the obtaining of, a contract by the Actor is through any employment agent or personal representative not holding a permit from Equity, or one whose permit is not in

> good standing, he is not only breaching the rules of Equity in employing the Actor under such condition, but is doing so with the knowledge that the Actor himself is liable for suspension or other disciplinary action by Equity and that he may thus be deprived of the Actor's services in this company";

The combination of these provisions and Equity's rules relating to agents and members endows Equity with the power to prevent and threaten prevention of, the performance of a legitimate theatrical production by a producer.

11. Theatrical agents have functioned and still do function as independent business entities. They bear substantial overhead for office space, employees, telephone services and other services and the economic risk of loss arising from the business of providing agency services to actors. Virtually all

of their revenues are derived from commissions in connection with employment they have obtained from their actor-clients. No commissions or other remuneration are received by the agents for their many unsuccessful attempts to obtain employment or for their consulting and related services rendered to actors.

12. The parties through their aforesaid national and interstate activities relating to the employment of actors in legitimate theatrical productions are engaged in interstate commerce. As such, they are responsible for a regular, continuous and substantial flow of invoices, bills, contracts, monies and people in interstate commerce.

THE ILLEGAL CONDUCT

13. Equity's membership consists of virtually all persons regularly employed

in legitimate theatre productions throughout the United States. Equity thus has virtually total control over the labor market for actors in legitimate theatre productions throughout the United States.

14. Equity has promulgated internal rules governing the conduct and discipline of its members. By virtue of its control over the labor market for actors in legitimate theatre productions, Equity has been able to enforce these rules by internal disciplinary procedures, which have in some cases resulted in fines, suspension, censure and expulsion of members from Equity.

15. Equity's internal rules prohibit members from employing, being serviced by, or paying commissions to non-franchised agents. Equity's franchise agreements with agents require the fran-

chised agents to adhere to Equity's rules. These rules comprehensively govern virtually all the terms and conditions pursuant to which a franchised agent can represent a member, including the maximum commission chargeable by, and payable to franchised agents.

16. In 1958, following meetings with TARA, Equity and TARA entered into a "sweetheart" agreement which purported to formulate the terms of a standard form franchise agreement binding all theatrical agents, as well as comprehensive rules regarding relations between theatrical agents and members known as "Equity Rules Governing Rule A" or as "Rule A". By the terems of Equity's standard form franchise agreement for theatrical agents, all of the terms of Rule A were incorporated by reference into the franchise agreement and were made binding upon the agents.

17. Rule A contains the following provisions, among others:

A. only franchised agents may represent members;

B. members may not be represented by nonfranchised agents;

C. the applications of TARA members and prior franchised agents as of June 4, 1958, for Equity franchises will be automatically granted. Other theatrical agents must pass Equity's formal application procedures;

D. Equity may waive compliance with its franchising requirements for theatrical agents it desires to favor and such a waiver unless otherwise stated is irrevocable;

E. the maximum commission rates franchised agents may charge

members, the duties of the agents to members, and the terms and conditions of contracts between agents and Equity members;

F. a contract between a franchised agent and a member is valid only so long as the agent is franchised (thus, if Equity disenfranchises an agent, for whatever reason, or the agent resigns his franchise, that agent's contracts with members atuomatically terminate);

G. all disputes between: any franchised agent and Equity; TARA and Equity; any franchised agent and an Equity member; must first be submitted to a joint Equity-TARA committee for settlement unless the agent objects in writing. In the event of an objection or if no set-

telment can be reached there is to be an arbitration in which Equity as an ex-offico party represents all actors and TARA as an ex-officio party represents all agents. If an agent objects to representation by TARA, TARA may nevertheless be represented at the arbitration proceedings;

H. Equity may invoke disciplinary proceedings against franchised agents which may result in franchise revocation or suspension, fines of up to $5000; and forfeiture of commissions owed to the agents;

I. franchised agents must pay initial and annual franchise fees to Equity;

J. franchised agents may not deal with producers who are on Equity's blacklist of producers (eu-

phemistically termed "the defaulting managers list of Equity");

K. franchised agents may not represent actors who are not or do not become members.

The provisions of Rule A are supplemented by: (1) the by-laws of Equity which subject a member who deals with a nonfranchised agent to expulsion from Equity; (2) the provisions in all collective bargaining agreements between Equity and the various producers groups or leagues referred to above in paragraph 10B.

18. Rule A as enforced and maintained by Equity has no legitimate labor objective or purpose and exists primarily to allow Equity:

A. to discriminate against plaintiffs and other nonfavored theatrical agents for the benefit of franchised agents and nonfranchised agents favored by Equity;

B. to totally, absolutely and arbitrarily regulate and dominate the manner in which theatrical agents conduct their business, despite the fact that these independant businesses are not employers of members, but rather obtain employment for them.

19. In 1977, plaintiffs and other agents determined that they would no longer continue to have the conduct of their business dominated and regulated by Equity and TARA. Accordingly, plaintiffs resigned their franchises in Equity and those plaintiffs who were members of TARA resigned from TARA because they could not in good conscience accept the terms and proposals for franchising of agents being negotiated by Equity and TARA.

20. Thereafter, in order to force nonfranchised agents, including plain-

tiffs, to become franchised, Equity organized and engaged in a group boycott by coercing and threatening producers and actors to refuse to deal with nonfranchised agents. The group boycott has been perpetrated, in part, by the dissemination of a blacklist dated December 27, 1977 to all producers and by agents of Equity threatening producers with deprivation of actors if they deal with a nonfranchised agent. In the cover letter accompanying the blacklist, Equity advised the producers, and sought their participation in the group boycott, as follows:

> "'The producer has notice if the negotiations for, or the obtaining of this contract, by the Actor is through any employment agent or personal representative not holding a permit from Equity, or one whose permit is not in good standing, he is not only breaching the rules of Equity in employing the Actor under such conditions, but is doing

so with the knowledge that the Actor himself is liable to suspension or other disciplinary action to Equity and that he may thus be deprived of the Actor's services in this company.'

None of these agents may represent Actors' Equity members except under certain special circumstances. We urge you, therefore, to contact the Equity office if any of the agents on the attached list are identified as the agent of record of any of your employees. We seek your cooperation in upholding your obligation to the Collective Bargaining Agreement in this regard." (Emphasis supplied)

21. In furtherance of the group boycott, Equity has threatened clients of nonfranchised agents with expulsion from Equity if they deal with a nonfranchised agent and has directed these clients to refuse to pay commissions owed to plaintiffs and others. Equity also requires the producers to advise Equity of the identity of each agent of any member that the producer may employ.

22. Each of the allegations in the foregoing paragraphs are incorporated by reference in each of the following claims as if set forth fully therein.

FIRST CLAIM

23. At all relevant times, and since prior to January 6, 1977, defendants and co-conspirators have unreasonably restrained trade in the interstate commerce of the rendering of services by theatrical agents to actors, in violation of Section 1 of the Sherman Act, by, among other things, combining, agreeing and/or conspiring:

A. to eliminate and destroy the business of plaintiffs and other nonfranchised agents who are not favored by Equity;

B. to diminish and eliminate competition between (1) plaintiffs and other nonfranchised agents who are not favored by Equity and (2) franchised agents and nonfranchised agents favored by Equity;

C. to discriminate against plaintiffs and other nonfranchised agents who are not favored by Equity;

D. to fix, stablize and maintain the maximum commissions theatrical agents may charge members and to control the other terms and conditions pursuant to which theatrical agents render services to members;

E. to eliminate price and nonprice competition between theatrical agents;

F. to deprive members of their free choice of theatrical agents;

G. to deprive producers of their free choice of theatrical agents and members;

H. to have Equity threaten to take, and to take disciplinary measures against members, who have entered into contracts or dealt with plaintiffs and other nonfranchised agents who are not favored by Equity;

I. to have Equity threaten producers with loss of services of its members if such producers employed members through plaintiffs and other nonfranchised agents who are not favored by Equity.

24. For the purpose of forming and effectuating the foregoing combinations, agreements and conspiracies, defendants and co-conspirators have done those things which, as hereinbefore charged,

they combined, agreed and consipired to do.

25. The foregoing combinations, conspiracies and agreements have had the following effects, among others:

A. competition between (1) plaintiffs and other nonfranchised agents who are not favored by Equity and (2) franchised agents and nonfranchised agents favored by Equity, has been diminished or eliminated;

B. plaintiffs and other nonfranchised agents who are not favored by Equity have been and are prevented from rendering services to members and face elimination from the business of rendering services as theatrical agents to members;

C. members have been denied the opportunity to select the theatrical agents of their choice to represent

them and have lost employement opportunities that would have otherwise been available to them;

D. producers have been prevented from using theatrical agents and members of their choice;

E. the maximum commission charged by theatrical agents have been fixed, stabilized and maintained as have the other terms and conditions pursuant to which theatrical agents render services to members;

F. producers and members have been threatened, coerced, and pressured to refuse to deal with plaintiffs and other nonfranchised agents who are not favored by Equity.

26. The restraints of trade alleged herein are unreasonable and not reasonably related to any legitimate labor-oriented objectives of Equity.

27. As a direct and proximate result of the foregoing restraints, plaintiffs have been and continue to be irreparably injured in their trade or business.

28. Plaintiffs have no adequate remedy at law.

SECOND CLAIM

29. All of the aforesaid acts and conduct of defendants and co-conspirators have constituted and continue to constitute an illegal monopolization, attempt to monopolize and combination and conspiracy to monopolize the trade and commerce of the business of procuring employment for actors in legitimate theatre productions and the rendering of related services in interstate commerce, in violation of Section 2 of the Sherman Act.

30. As a direct and proximate result of the aforesaid illegal acts and conduct of defendants and co-conspirators, plaintiffs have been irreparably injured in their business and property.

31. Plaintiffs have no adequate remedy at law.

WHEREFORE, plaintiffs seek judgment against defendants:

A. preliminarily and permanently enjoining defendants from in any way interfering with plaintiffs attempting to or rendering of any services to any member or any producer, including but not limited to, threatening any producer or member with any disciplinary action.

B. awarding plaintiffs the reasonable costs and disbursements of this action, including attorneys' fees; and

C. granting such other and further relief as this Court may deem just and proper.

Dated: New York, New York
May 26, 1978

BOWDITCH & DEWEY

By /s/CHARLES DONELAN
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Caption Omitted In Printing]

AMENDED ANSWER

Defendants Actors' Equity Association ("Equity") and Donald Grody ("Grody"), by their attorneys, Cohn, Glickstein, Lurie, Ostrin & Lubell, for their Amended Answer in this action state as follows:

1. Deny each and every allegation contained in paragraph 1 of the Complaint, except admit that plaintiffs purport to bring this action as an action to remedy alleged violations of Section 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2) and that plaintiffs purport to invoke the jurisdiction of this Court pursuant to Section 16 of the Clayton Act (15 U.S.C. §26).

2. Deny each and every allegation contained in paragraph 2 except to state that defendants lack knowledge or information sufficient to form a belief as to those allegations which pertain to plaintiffs' residence or location for the transaction of business within the Southern District of New York or elsewhere.

3. Admit that in paragraph 3 of the Complaint, plaintiffs purport to define what certain terms, as used in the Complaint, shall refer to, mean, or include.

4. Deny knowledge or information sufficient to form a belief as to the allegations in paragraph 4 of the Complaint, except admit that plaintiffs purport to be theatrical agents having a place of business and doing business in the City, County and State of New York.

5. Deny each and every allegation contained in paragraph 5 of the Complaint, and aver that Equity has at all relevant times been an unincorporated association functioning as a labor union on behalf of its members; that Equity currently has its principal place of business at 1500 Broadway, New York, New York; that since at least 1940, most persons who have regularly performed in legitimate theatre productions in the United States have been or become members of Equity; and that most producers have been parties to collective bargaining agreements with Equity. Defendants lack knowledge or information sufficient to form a belief as to the allegation that each plaintiff has a substantial number of clients who are members of Equity and who have performed in legitimate theatre productions.

6. Deny each and every allegation contained in paragraph 6 of the Complaint, except admit that Grody resides in the State of New York, and aver that Grody is Executive Secretary of Equity and resides inthe City of New Rochelle, in the County of Westchester.

7. Deny each and every allegation contained in paragraph 7 of the Complaint, except admit that the Theatrical Artists Representatives Association, Inc. ("TARA") is, and at all pertinent times has been, an association of theatrical agents.

8. Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph 8 of the Complaint, except admit that legitimate theatrical performances are presented on and off Broadway in New York City, and that live theatrical performances have

been presented by summer stock groups and dinner theatres, that some persons travel over State lines to see legitimate theatrical productions, and that some actors travel over State lines to perform in legitimate theatrical productions.

9. Deny each and every allegation contained in paragraph 9 of the Complaint except admit that since at least 1960, Equity has entered into collective bargaining agreements with all of the associations enumerated in paragraph 9.

10. Deny each and every allegation contained in paragraph 10 of the Complaint except admit that Equity's collective bargaining agreements with the associations of producers listed in paragraph 10 of the Complaint require producers, with some exceptions, to employ actors who are or become Equity members and have contained the language quoted in

paragraph 10B, and aver that said language has never been interpreted or enforced by Equity to prohibit producers from dealing with non-franchised agents.

11. Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph 11 of the Complaint.

12. Deny knowledge or information sufficient to form a belief as to the allegations contained in paragraph 12 of the Complaint.

13. Deny each and every allegation contained in paragraph 13 of the Complaint, except admit many persons regularly employed in legitimate theatre productions throughout the United States are members of Equity.

14. Deny each and every allegation contained in paragraph 14 of the Complaint, except aver that Equity, like all

labor unions, has rules governing the conduct of its members, and that Equity enforces these rules by internal disciplinary procedures.

15. Deny each and every allegation contained in paragraph 15 of the Complaint, except admit that Equity has rules and franchise agreements governing some of the terms and conditions pursuant to which a franchised agent can represent a member, including the maximum commissions chargeable, and that Equity's rules prohibit members from employing non-franchised agents, and aver that these rules and franchise agreements were created and operate to protect Equity members from exploitation and to prevent their negotiated minimum wages and working conditions from being invaded or destroyed, and further aver that rules and franchising agreements pertaining to theatrical

agents were first promulgated by Equity in 1928.

16. Deny each and every allegation contained in paragraph 16 of the Complaint, except admit that Equity promulgated Rule A in 1958 following discussions with TARA, and admit that the terms of Rule A are incorporated by reference into Equity's standard form franchise agreement for theatrical agents.

17. Deny each and every allegation contained in paragraph 17 of the Complaint, aver the Rule A contains provisions similar to some of the provisions alleged in paragraph 17, and refer to Rule A (attached to Donelan's affidavit in support of plaintiffs' motion for preliminary injunction) for the precise terms and provisions thereof.

18. Deny each and every allegation contained in paragraph 18 of the Complaint.

19. Deny each and every allegation contained in paragraph 19 of the Complaint, except admit that plaintiffs resigned their Equity franchises in 1977, and deny knowledge or information sufficient to form a belief as to the plaintiffs' motives or intentions for their resignations.

20. Deny each and every allegation contained in paragraph 20 of the Complaint except admit that on December 27, 1977, Harriet Slaughter, then Assistant Executive Secretary of Equity, sent a letter containing the language quoted in paragraph 20 of the Complaint to some managers.

21. Deny each and every allegation in paragraph 21 of the Complaint, except admit that Harriet Slaughter sent a letter, dated June 20, 1977, containing inter alia, an instruction to Equity mem

bers to withhold commissions from agents unless the agent and actor have executed and filed with Equity an Agency Authorization or Exclusive Management Contract, and admit that the standard Production Contract which producers are required to file with Equity contains a place for identification of the agent of record.

22. Deny each and every allegation contained in paragraphs 23, 24, 25, 26, 27, 28, 29, 30 and 31 of the Complaint.

AS AND FOR A FIRST
AFFIRMATIVE DEFENSE

23. The Complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND
AFFIMATIVE DEFENSE

24. The activities and operations of theatrical agents, including the com-

missions charged by them, have had and continue to have a direct and substantial effect on the minimum wage scales and working conditions negotiated by Equity on behalf of its members.

25. Theatrical agents representing Equity members are in an economic interrelationship with Equity's members affecting Equity's legitimate union interest in the wages and working conditions of its members.

26. Equity's agency franchising system was established and is maintained by Equity to regulate the relationship between agent and actor, in order to insure that agents render competent and ethical representation which does not undermine the minimum wages and conditions negotiated by Equity.

27. By reason of the foregoing, Equity's conduct in maintaining its

agency franchising system is immune from the federal antitrust laws pursuant to the labor exemption of §§6 and 20 of the Clayton Act (15 U.S.C. §17, 29 U.S.C. &52), and the Norris-LaGuardia Act (29 U.S.C. §§101-115).

AS AND FOR A THIRD
AFFIRMATIVE DEFENSE

28. Repeat and reallege the allegations contained in paragraphs 24 through 26, inclusive, of this Answer as if set forth in full herein.

29. Equity's agency franchising regulations and its enforcement thereof are intimately related to the wages and working conditions of Equity's members.

30. Equity's agency franchising regulations and its enforcement thereof do not have a potential for restraining competition in the market alleged in the Com-

plaint or any other alleged business market in ways that would not follow naturally from elimination of competition over wages and working conditions.

31. Equity's agency franchising regulations and its enforcement thereof do not give Equity control over the market alleged in the Complaint or any other alleged market beyond that necessary to further Equity's legitimate interest in maintaining the wages and protecting the working conditions of its members.

32. By reason of the foregoing, Equity's conduct in maintaining its agency franchising system is immune from the antitrust laws pursuant to the non-statutory labor exemption.

AS AND FOR A FOURTH
AFFIRMATIVE DEFENSE

33. Repeat and realleges the allegations contained in paragraphs 24 through

26, and 29 through 31, inclusive, of this Answer.

34. Equity's franchising system is based on reasonable and legitimate business concerns and, under all the circumstances, does not impose an unreasonable restraint on competition in violation of the antitrust laws.

AS AND FOR A FIFTH
AFFIRMATIVE DEFENSE

35. Plaintiffs are formerly franchised agents who had notice of and operated within Equity's franchising system for many years and nevertheless refrained from commencing this action until May 26, 1978.

36. By reason of the foregoing, plaintiffs are barred by laches from the relief sought in their Complaint.

AS AND FOR A SIXTH
AFFIRMATIVE DEFENSE

37. Repeat and reallege the allegations contained in paragraph 34 of this Amended Answer as if set forth in full herein.

38. Plaintiffs were formerly members of TARA, which participated fully in the formulation of Rule A and its revisions.

39. Upon information and belief, each of the plaintiffs has participated since the commencement of his/her membership in TARA in the activities and involvement of TARA in connection with the formulation, revisions, and support of Rule A.

40. By reason of the foregoing, plaintiffs are estopped and barred from complaining of the agency franchising system embodied in Rule A.

AS AND FOR A SEVENTH
AFFIRMATIVE DEFENSE

41. The conduct complained of in the Complaint is the subject of unfair labor practice charges under the National Labor Relations Act, 29 U.S.C. §§151 et. seq.

42. By reason of the foregoing, the exclusive jurisdication of the National Labor Relations Board pre-empts and bars the granting of the relief sought in the Complaint.

AS AND FOR A EIGHTH
AFFIRMATIVE DEFENSE

43. Plaintiffs themselves have combined and conspired to fix the commissions which they charge to Equity members, in violation of Section 1 of the Sherman Act.

44. By reason of the foregoing, plaintiffs are barred by the doctrine of unclean hands from the relief sought in their complaint.

WHEREFORE, defendants demand judgment dismissing the Complaint herein and for such other and further relief as this Court deems just and proper, including the costs and disbrusements of this action.

Dated: New York, New York
October 19, 1978

Yours, etc.,

COHN, GLICKSTEIN, LURIE,
OSTRIN & LUBELL
Attorneys for Defendants
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By: /s/Mary K. O'Melveny
A Member of the Firm

STIPULATED FACTS PORTION
OF THE JOINT PRETRIAL
ORDER FILED IN
THE DISTRICT COURT

The parties stipulate to the truth and accuracy of the following facts for the purposes of this action only. All objections to admissibility of these facts are reserved for trial.

1. AEA is a labor organization representing actors in the legitimate theatre field throughout the United States. It has approximately 23,000 members. Donald Grody is Executive Secretary, the chief executive officer of AEA. AEA is governed by a Council, consisting of councillors elected by the membership.

2. AEA is the traditional theatre actors' union. Virtually all major New York producers, and most other major theatrical producers throughout the United States, have collective bargaining agreement with AEA.

3. AEA negotiates collective bargaining agreements with theatrical producers, who are the employers of AEA members. No agent participates in these negotiations.

4. These collective bargaining agreements prescribe minimum working conditions and salaries for members of the bargaining units represented by AEA.

5. Theatrical agents are independent contractors who, inter alia, negotiate contracts and solicit employment for their actor-clients.

6. Agents who operate in New York City are required to be licensed as employment agencies and regulated by the Department of Consumer Affairs of New York City pursuant to Article 11 of the General Business Law of the State of New York, which, inter alia, sets the maximum commissions employment agencies may

charge and has specific provisions dealing with theatrical agents.

7. Most or all plaintiffs are employment agencies licensed by the Department of Consumer Affairs of New York City pursuant to Article 11 of the General Business Law.

8. In 1928 AEA unilaterally established a licensing system for the regulation of agents.

9. Licensed agents were required, inter alia, to abide by a schedule of commissions established by AEA and to abide by other rules.

10. Since 1928, AEA members were required to deal only with agents who were licensed by AEA and were subject to discipline by AEA for dealing with agents who were not licensed.

11. From 1928 to the present, AEA's agency regulation system has contained

the same elements referred to in paragraphs 8, 9 and 10.

12. In the 1950's, the majority of agents franchised by AEA were members of TARA, a trade association of agents working in the legitimate theatre field.

13. Holding an AEA franchise was condition of membership in TARA.

14. Membership in TARA was not a condition to obtaining an AEA franchise.

15. Prior to 1958, AEA granted three types of franchises: Personal Representatives' Permits; Special Representatives' Permits; and Employment Representatives' Permits. An agent could apply for one or more permits, and the minimum terms and conditions of his relationship with his actor/clients, including the maximum commission which could be charged, depended on the permit(s) held as well as type and terms of

the employment contract negotiated with the producer.

16. In the 1950's discussions were held between AEA and TARA for the purpose of modifying the agency franchising system. As a result of the discussions, agency regulations known as "Rule A," effective June 4, 1958, were promulgated.

17. AEA required TARA members and other agents seeking to represent AEA members to become franchised by AEA, under Rule A.

18. The stated purpose of Rule A was "to regulate the dealings of its [AEA's] members with agents and artists' managers relating to employment and professional careers of actors in the legitimate theatre industry." Rule A provided, inter alia:

A. the maximum commission rates agents could charge members, the

duties of the agents to AEA members, and the terms and conditions of contracts between agents and AEA members. Maximum commission rates, varied in accordance with the type of agency contract, the type of employment contract, and the terms of the employment contract. Some commissions were permitted on minimum salaries, not exceeding 5% of earnings for the first ten weeks;

B. only agents franchised by AEA were permitted to represent its actor-members;

C. the existing permits of the three types referred to in paragraph 15 were terminated and a single franchise substituted;

D. an actor and agent could enter into one of three types of agency contracts: the Special Management

Contract; the Agency Authorization; and the Exclusive Management Contract. The Exclusive Management Contract, which had no analogue prior to Rule A, permitted an actor to terminate it if the agent did not obtain for him a specified amount of employment within specified time limits;

E. an actor could negotiate with an agent terms which were more, but no less, favorable to the actor than those contained in Rule A;

F. all agency contracts were required to be in writing with a copy filed with Equity;

G. a contract not in writing or properly executed could be voided at the option of the actor, and the agent had no right to commission under such voided contract;

H. an actor had the right to terminate an agency contract where the persons who were active in the agency when he signed his agency contract ceased to be active;

I. limitations on commissions were not to be avoided or evaded by any device or arrangement for payment to the agent of additional compensation;

J. an agent working on behalf of an employer (e.g., as a casting director) could not collect commissions from actors the agent placed while acting on behalf of the employer;

K. an agent working with a correspondent agent was not permitted to charge more than a single commission;

L. AEA agreed to grant new franchises to TARA members and other previously franchised agents, under the terms and conditions of Rule A;

M. applications for franchises by applicants who were not previously franchised were required to be accompanied by letters of reference from five AEA members in good standing. AEA's Council considered recommendations of the Agency Committee and made the final decision with respect to the granting of a franchise;

N. when AEA refused to grant a franchise, the applicant had recourse to arbitration;

O. franchised agents were required to pay initial and annual franchise fees to AEA;

P. agents were required to comply with certain provisions relating to ownership and control (e.g., prohibiting producers from owning a controlling interest in the agent);

Q. franchised agents were prohibited from dealing with producers on the defaulting managers' list of AEA, i.e. producers or managers whom AEA contends owe money to actors from a prior production;

R. AEA could waive compliance of its franchsing requirements for agents and such a waiver unless otherwise stated was irrevocable;

S. an attorney who performed services for a member of AEA was not deemed to be an agent unless such services included solicitation of employment in the legitimate theatre for the members, or the attorney

held himself out as an agent or engaged generally in the business of an agent;

T. disputes under Rule A between actor and agent(s), agent and AEA, or TARA and AEA were to be resolved by tri-partite arbitration under the auspices of the American Arbitration Association, where settlement attempts failed. Commissions subject to conflicting claims by two or more agents were required to be placed in escrow with AEA pending resolution of the dispute;

U. Equity could invoke disciplinary proceedings against agents which could result in franchise revocation or suspension, assessment of liquidated damages up to $5,000, and forfeiture of commissions;

V. Rule A was to remain in force at least until June 4, 1963, and thereafter until "terminated" by either TARA or AEA following six months prior written notice;

W. following termination of Rule A, agency contracts between a formerly franchised agent and an actor were to remain in force and the agent was to be deemed to be franchised with respect to such agency contracts only.

19. The relationship between actor and agent was set out in Rule A and in the standard form agency contracts issued by AEA.

20. AEA's by-laws subject an AEA member who deals with a non-franchised agent to discipline including fines, suspension or expulsion from AEA.

21. In about 1974, there was a series of meetings between TARA, AEA, and The League of New York Theatres, a trade association representing major New York City theatrical producers.

22. By letter dated March 25, 1975, from TARA President Robert Lantz to Grody, TARA requested discussions for the purpose of modifying Rule A and specifically, increasing maximum commissions.

23. In or about 1975, TARA and AEA commenced discussions with respect to modifications of Rule A.

24. During the discussions TARA gave six months' notice to "terminate" Rule A. The termination date was extended several times by mutual consent of TARA and AEA.

25. During the discussions, AEA submitted to TARA proposals which would have increased some commissions collect-

able by agents, although it did not meet TARA's demand for 10% "from the first dollar" - i.e. 10% on all monies earned, regardless of whether the actor's salary exceeded minimum.

26. During the discussions, AEA agreed to TARA's request that as part of any new agreement, AEA would enforce the provisions of Rule A prohibiting non-franchised agents from representing AEA members and AEA agreed.

27. The discussions were unsuccessful and on January 6, 1977 TARA terminated Rule A.

28. As a result, most or all TARA agents and some other agents were then unfranchised and were permitted to represent AEA members only under pre-existing agency contracts.

29. Many of the plaintiffs were members of TARA.

30. Rule A remained in effect for those agents who agreed to abide by it, and such agents were permitted to represent AEA members for all purposes.

31. On or about May 2, 1977, seven agents, including five who are plaintiffs herein, filed a lawsuit in the Federal District Court for the Southern District of New York, challenging AEA's agency franchising system under the anti-trust laws (Hidden, et al. v. Actors' Equity Association, et al., 77 Civ. 2624, (J.M.C.)). The complaint in that action requested a permanent injunction prohibiting AEA from enforcing the agency franchising system.

32. The lawsuit was initiated and financed by TARA, which solicited contributions from agents for this purpose.

33. Discussions between AEA and TARA continued while the lawsuit was pending.

34. The lawsuit was withdrawn without prejudice in or about August, 1977.

35. NATR, is a trade association of agents who represent actors in the legitimate theatre and other fields. NATR was in existence prior to August 1977.

36. All plaintiffs herein are NATR members.

37. By letter dated August 31, 1977, plaintiffs (with the exception of STE Representation Ltd. which is still a TARA member) advised AEA that they wished to be represented by NATR and that they "had resigned from TARA because they cannot in good conscience accept the terms and proposals being negotiated by Equity and TARA."

38. In or about October 1977, AEA and TARA agreed to new Equity Agency Regulations and many of the agents who were franchised prior to January 6, 1977 became refranchised by AEA.

39. The Equity Agency Regulations, inter alia, revised the schedule which regulated the commissions which franchised agents could charge and increased the franchise fees payable to AEA by agents.

40. With the exception of H.A. Artists & Associates, Inc., all or most plaintiffs have remained unfranchised since January 6, 1977.

41. Following the January 1977 termination of Rule A by TARA, AEA has communicated to actors, agents and producers concerning the "dispute" over the agency regulations.

42. In January 1977, AEA notified actors, agents and producers of TARA's termination of Rule A.

43. Since January 1977, AEA has advised its members and producers of discipline which could result to its members from dealing with non-franchised agents.

44. In letters to producers, AEA has quoted the following paragraph [2(A)] which has appeared for many years in the printed collective bargaining agreements between AEA and various producer groups:

> "The producer has notice that if the negotiation for, or the obtaining of, this contract by the Actor is through any employment agent or personal representative not holding a permit from Equity, or one whose permit is not in good standing, he is not only breaching the rules of Equity in employing the Actor under such condition but is doing so with the knowledge that the Actor himself is liable for suspension or other disciplinary action by Equity and that he may thus be deprived of the Actor's services in this company."

45. By letter of December 27, 1977, AEA advised producers of the identify of non-franchised agents and stated:

> "None of these agents [on the enclosed list] may represent Actors' Equity members except under cer-

> tain special circumstances. We urge you, therefore, to contact the Equity office if any of the agents on the attached list are identified as the agent of record to any of your employees. We seek your cooperation in upholding your obligation to the Collective Bargaining Agreement in this regard."

46. AEA advised its members that they were not obligated under Rule A to pay commissions for jobs obtained by agents with whom they did not have signed AEA agency contracts.

47. By letter dated June 20, 1977, AEA advised its members:

> "Up until this time Equity has advised all unsigned actors they are not obligated to pay commissions. As of June 15th you are instructed not to pay commissions."

48. Prior to the fall of 1977, the standard from individual employment contracts used under the "Production Contract" (the collective bargaining agree-

ment covering major Broadway plays) did not provide for the identification of the member's agent, if any, although some of the Union's other standard form employment contracts had long contained a place for identification of the agent of record, if any.

49. In late 1977 AEA issued a revised standard form individual employment contract for use under the Production Contract. Among other changes, it included a place for identification of the actor's agent of record, if any. By letter dated March 16, 1978, AEA wrote to producers in connection with the new forms:

> "Dear Producers:
>
> Please be advised that the new employment contracts for the Production contract are now available at the Equity office. We hope you are

now using these new contract forms.

* * *

May we call your attention to several changes in regard to these new contracts:

* * *

(d) A new line has been added for the agent of record. In this regard, may we remind you of your obligation under Rule 2(A), Agents, 'Permit Holding,' under the Agreement Governing Employment under the Production Contract..."

50. By letter dated June 27, 1978, AEA wrote to producers:

"...none of you is obliged under our contract to include the agent's name. We believe, however, that the inclusion of the agent's name is a valuable piece of information to appear on the contract, assists us in implementing our Agency Regulations and forecloses subsequent disputes between actors and agents. We therefore earnestly solicit that you will continue to include the name of the agent if

in fact an agent has represented our member. Naturally, whether you do or do not is entirely up to you."

51. By letter dated June 30, 1978, AEA wrote to producers:

"As you know, we have a provision in our Collective Bargaining Agreement, Rule 2(A), which deals with Equity's rules in connection with agents. As written, the Rule contains certain ambiguities. I am sure you are aware that it has never been our intention, nor have we ever tried, to impose what appears to be an obligation on producers to adhere to our Agency Regulations. Therefore we propose that Rule 2(A) be modified to accord with our practices and to read as follows:

The producer has notice that if the negotiations for, or the obtaining of this contract by the Actor is through any employment agent or personal representative not holding a permit from Equity, or one whose permit is not in good standing, the Actor is liable to suspension or

other disciplinary action."

52. Upon learning that an AEA member has been represented by an agent with whom the member does not have on file with AEA an agency authorization or management contract, AEA has sent the following form letter to the member, with a copy to the agent:

> "An employment contract has been received by Actors' Equity which names the above agent as the agent of record. It is imperative that you execute and file with Equity an Agency Authorization or Exclusive Management Contract in order to be validly represented by a franchised agent. The original agreement should be kept by you, a copy should be filed with Equity at once, and the third copy should be filed with the agent.
>
> Any agent who seeks to represent you without signing the proper contract could result in disciplinary action being taken against you.

> Some agents have refused to abide by Equity's Rules and Regulations Gonverning Agents and are operating outside out agency rules. It is important to protect the principal behind Equity's agency franchise system. Therefore, a proper agency contract must be in effect in order for Equity to properly administer the agency agreement between actors and agents."

53. By letter dated March 6, 1979, AEA advised its members:

> "It is an unfortunate fact of life that since January 6, 1977, the rules concerning the franchising of Agents and the representation of members by duly-franchised Agents have been muddied. Following our national referendum in March 1977, the group representing the largest number of Equity franchised Agents, Theatrical Artists' Representatives Association (TARA), agreed in October of 1977 to adhere to the regulations promulgated by Equity. It is understandable that a period of confusion followed, during which time Equity attempted to

clarify the new rules to Agents, as well as to our own members. The situation is further complicated by the emergence of a new group purporting to represent agents, the National Association of Talent Representatives (NATR). This group commenced a civil court action in the Federal District Court in May of 1978 in an effort to enjoin Equity from enforcing its Agency regulations. That suit is pending and we have every reason to believe that we will prevail.

Unfortunately, our successful defense will not require the 23 NATR Agents to adhere to our regulations governing Agents. That can be accomplished in only one way, through Equity members themselves. If the Equity Agency Regulations are to be meaningful, if the understandings we have reached with TARA are to have full force and effect, and if all Equity members are to be bound and protected by the rules, then we cannot permit <u>any</u> Equity member to violate the rules when it is to his own personal advantage.

Consequently, THE EQUITY COUNCIL HAS RESOLVED THAT, EFFECTIVE MONDAY, APRIL 2, 1979, EQUITY WILL STRONGLY ENFORCE ITS RULE THAT MEMBERS CANNOT SEEK OR ACCEPT REPRESENATATION BY NON-FRANCHISED AGENTS. This means that you are prohibited from dealing with non-franchised Agents in any of the following ways:

1. You may not sign a contract with a non-franchised Agent or enter into an oral understanding;

2. You may not be submitted for roles by a non-franchised Agent;

3. You may not permit a non-franchised Agent to negotiate a salary or any other contractual provisions (e.g., billing) for you;

4. You may not pay commissions to a non-franchised Agent.

Upon consideration of this matter, the Council indicated that violators would be subject to very substantial fines as well as possible suspension and expulsion from the Union. The Council discussion

noted that fines in the vicinity $1000 would not be inappropriate. This action has had to be taken because no other course is open to the Union."

54. By Letter dated May 8, 1979 AEA advised Lee Meredith, an AEA member:

"We are in receipt of information which indicates that you are in violation of the long-standing Equity Rule prohibiting members from dealing with agents who are not franchised by Equity for work in legitimate theatre. As you may be aware, our Agency Franchising system has been in effect since 1929.

In order to protect our membership at large, we are compelled to initiate disciplinary procedures against members, like yourself, who choose to disregard this rule."

55. Some franchised agents are members of TARA.

56. Some plaintiffs compete with members of TARA.

57. Plaintiffs have obtained AEA jobs for AEA members in New York, New Jersey, Pennsylvania, Connecticut, California and other states.

58. Franchise fees received by AEA are deposited in its general funds.

59. AFTRA and SAG, unions representing actors in the radio, television, and screen areas, both regulate talent agents. Most or all of the plaintiffs are franchised by both AFTRA and SAG. Many actors are members of AEA, SAG and AFTRA.

60. AFTRA prohibits commissions on scale. SAG prohibits commission on scale unless the membership votes, in local referendum, to permit it. The New York SAG local, allows agents to charge commissions on scale.

61. The agents' licensing agreement which is part of Defendants' Exhibit JX in American Federation of Musicians v. Car-

roll, 241 F.Supp. 865 (S.D.N.Y.) is exhibit Q to defendants' list of exhibits.

TRIAL TESTIMONY OF
THELMA RAIDER IN THE DISTRICT COURT

* * *

[65]Q Does Talent Representatives have employees?

A Yes, it has. We have a secretary and a subagent.

Q And yourself?

A Myself and my partner.

Q How many people who conduct agency services as such?

A Three.

Q Their names, besides yours?

A Steven Kaplan, my partner, Ruth Lehner, our subagent.

Q Is Talent Representatives -- is your talent agency, Talent Representatives, licensed by the State of New York?

A It is.

* * *

[74]A The thread was lost. However, I must say that it is the actors that I represent and the actresses who have told me that this is the kind of representation they want.

As you develop their career, you are doing more than just getting them a job, negotiating a contract. You are trying to develop an ongoing thing with them. You are trying to create a sense of confidence in that actor. You are trying to guide him in what is best for him to do to achieve the career he wants.

You are going to counsel him and you just cannot break that from one Union jurisdiction to another. It is -- the agent becomes a mother, a father, a [75] confidant, a sister, everything to that actor, if there is a good relationship between that agent and that actor.

Q In effectuating this representation of actors, what exactly do you do, directing your attention first to the attempt to find employment, what does an agent actually do, what actions does he take?

A Well, of course, the first action upon meeting an actor that wants you to represent him or you think you would like to represent, is to try and introduce him to the people in the industry that are going to be helpful in furthering his career.

We do that -- I do that by numerous telephone calls by sending out mailings on that actor, including pictures and resumes, sometimes tapes.

By arranging for the actor by appointment to meet casting directors or producers, or people in the area where they can give him employment.

I will entertain casting directors

or producers or writers and say, "I would like you to have lunch with me and meet John Doe."

I will go to dinner with these people. I will attend for them a lot of off-Broadway shows, a lot of workshop productions, a lot of productions that are going on in lofts or garages, because if my actors are appearing [76] there I want to see them.

If I see them, I want other people to see them. So it is just a constant thing. You do whatever it is you have to do, which is almost take up every area of the industry where this man or this woman is going to want to move ahead and do everything you can to make it easy for them to move ahead.

* * *

[84] Q What expenses does an agency have, a talent agency?

A Well, of course the basic ones, our representation, our telephone, postage, messenger service. Those are very large expenses, and a secretary. If you are a big agency, I guess you have more than one, but we have one secretary.

Then you have the expenses of the entertainment which is very necessary in this field. You have to entertain your clients because you cannot always have the kind of conversations they want to have with you in the office. The phone is ringing, other clients are walking in, and if they have a problem and they want your attention, is it out to dinner or out to lunch.

Another major expense is the entertainment of the producers and casting directors which I have mentioned before. You must pay for that. It is part of getting yourself known, it is part of getting

your clients known.

Then you must go to the showcase productions because that is the place you find new talent, and you must go to the off-Broadway productions because that is a place you find new talent.

In addition, of course, you are going to go to [85] Broadway productions because not only may you find a new client there, but also you will have your own client appearing in these productions. And you have the transportation expenses and you have the entertainment expenses of the tickets to these productions because nobody gives these to you for nothing. You have to pay for them.

And I remember when we first went into business, our first year or I think it was our second year, for some reason, we were lucky enough to get a number of our clients into Broadway productions.

But it was a bad year on Broadway. It seemed anything we got our clients in and they are primarily scale performers, because we're not a big agency. Elizabeth Taylor and Richard Burton do not need talent representatives.

So we would have these performers in these productions, they would go through rehearsal period, the show would open, we would buy tickets, we would send a telegram to an actor, we would send flowers to an actress on opening night, we would meet them after the show, take them out for a drink or a dinner and the show would close the next week or the second week and one day I was very happy because a client I liked a great deal got her first break and was going into a show and I said to my partner, Steve, [86] "Steve, so-and-so is going into the show," and he said to me, "One more

Broadway show and we're bankrupt."

Q All these things that you have told us about that you pay for, what income, how do you get your income as a talent agent?

A Commissions.

Q Just exactly what is a commission?

A A commission is a percentage of the salary that we negotiate for the actor. And that commission is regulated by New York State law. We can collect up to 10 percent. No more.

* * *

[88]Q Let's talk about commissions, Ms. Raider. You mentioned that New York State law has a ten percent limit. Are there other restrictions that you operated under when you were franchised by Equity?

A Yes.

Q What were they?

A The major restriction we operated un-

der when we were franchised by Equity, was a rule that said we could not collect commission on minimu.

Q Stop you right there. What is "minimum"?

A "Minimum" is the minimum wage a producer can pay to an actor in a production.

Q Where is this found?

A That is found in the collective bargaining agreement between the Union and the producers.

Q In the case of a Broadway production, who is the producer organization that negotiates the collective bargaining agreement with Equity?

A I believe it is the League of New York Theater Owners.

Q Does that have a minimum scale wage in it?

A Yes it does.

Q And how does that affect what you do?

[89]A I can under no conditions, nor can any client of mine, work, have him work -- I can under no conditions have any client of mine work for less than that minimum wage. It is impossible.

Q Why is it impossible?

A Because the rule is made between the Union and the producer that the producer cannot pay him any less than that money.

Q What do you call this regulation of the commission in Equity?

A That is Rule A.

Q Is that a written document?

A Yes, it is.

Q Does it have other provisions which govern what you, as an agent, may charge a member of Equity for your services?

A Yes, it does. There are a number of restrictions. Rule A is a book of restrictions on agents.

Q In negotiating for a job for a client

who is seeking a job that Equity produces, what are your objectives?

A My objectives are always to get as much money as I possibly can for that actor. I do not negotiate for minimum. I don't want minimum, which is that basic salary that the Union and the producers have evolved.

[90] Number one, the more money I make for an actor, the more money I make and that allows me to keep my doors open. But very often, no matter how hard I try, especially with a beginning actor or one who has not achieved any sense of notoriety, I cannot get above minimum.

One of the reasons I can't get above minimum, is that there are so many actors in New York who are unemployed and who are anxious to work. That is very true. Producers know this.

So my hands are pretty much tied if I

have an actor who has no track record. When I say to the producer, "Well, I mean, you know, you just can't pay him $350. We have to have $450 or $500, and he wonderful and he is this," and the producer will say to me, "This is a scale job. Your actor doesn't want to do it, there are ten others who will."

And I will say to my actor, "Look, no matter what I say or no matter how hard I try, this is a scale job. We can wait and try to get something better. I think you are worth more than scale." And I have put in all the time with the entertaining and the messengers and going to see and counseling him on how to dress or how to cut his hair and he will say to me, "I don't care if it is scale, I want that job." And I say, "Fine." And I still [91] go in there and I still negotiate for the billing and I still try to

negotiate the best contract I can for him and when it is all over, I can collect nothing.

Q You mentioned "billings."

What did you mean by that?

A "Billing" is where the actor's name appears on the program and on the house boards, the size of his name, the type, whether it is above -- with my clients it has never been above the title, but how large it is and all the areas where that actor's name is going to be shown that gives him again, standing.

It proves he has been in a Broadway or off-Broadway production. It is very important.

Q Is above the title better than below the title?

A Yes, that is a star. Elizabeth Taylor is above the title.

Q How many actors do you represent right now who normally are billed above the

title?

A Normally, none.

Q Are there other things which you negotiate for?

A Excuse me one second. You said "normally." I do have, I believe it was, two actors, but that is because they have a name and a reputation in television, not the [92] legitimate theater per se, but because they were in legitimate theater productions they were billed above the title. Sixteen years I thought that was good.

Q Are there other things that you seek in your negotiations for an actor from a producer?

A Oh, well, you seek dressing rooms and you seek for transportation, and if it is a production that is out of town, you know, you question the housing. You seek out clauses, which is a clause in a con-

tract that will allow the actor out of a production should perhaps, somebody from Hollywood see him and think he would be right for a series or a movie.

You are also aware from the moment you get somebody into any kind of production that that is not the end of the career. Your work begins when an actor gets into a production because that is the time he is visible. That is the time you can make other producers come and see him, other casting directors witness what he can do.

It is the time to build him up. It is the time to move him ahead. It is the time you do your hardest work.

Q What is this "out clause" that you mention?

A As I said, it is a clause in the contract that [93] allows your client to be released in a certain number of weeks' notice in order to do something else that

may further his career, or something else that he very much wants to do, even though it might not further the career.

* * *

[94]Q What services do you perform when that show is beginning and your client is out of town?

A Well, hopefully, our services start while they are still in town, when the client has been hired, and usually there is a rehearsal in New York. And you make sure each day or your client will call you each day, to let you know how things are going and to raise any questions that he might have about what his part was in this play, et cetera.

[95] You counsel him constantly because it is a nervous time for a client when he is just starting out in a show. Then we have gotten through that time and the client goes out of town, and you will get a call long-distance, collect. And he will

tell you that this has gone wrong or that has gone wrong and what can you do about it?

So then you again get in touch with the producer or do all those things you have to do and he says "When are you coming out to see me?"

And I usually try and say "Well, I very much want to see you. Do you need it this week or can you wait until maybe you come to Chicago?"

Simply because maybe this week I have a kid graduating from school or something.

And if it can be Chicago, I then fly out to Chicago and I see the production in Chicago, and then I fly back.

They may have gone from Chicago to Atlanta and in Atlanta something has happened that I have no control over and well maybe they have replaced another person in the cast and you get a phone call that

says, "Honey, I think you should come and see the show down here. I think it is a different show and I want you to really tell me what you think." Or while they are on the road, any number [96] of things happen.

But what you are going constantly is you are in touch with your client. Your client calls you, your client writes to you and you must take care of every matter, sometimes even including his apartment.

I have even been asked to rent an apartment while a client is on the road and you do it because he is your client.

Q Who pays for that plane ticket to Chicago and back?

A I do.

Q And who pays for all the phone calls?

A I do.

Q Do you ever hear from anyone other than the actor when he is on the road?

A Oh, yes.

Q Who is that?

A We sometimes hear from the producer. We sometimes hear from the director.

Q Why would you hear from the producer? What is that problem?

A Well, that can sometimes be there can be a misunderstanding or something going on on the stage or during the tryout and you get a call that says, "I think [97] you had better talk to your actor because this and this and this has happened and I think it would be a very good idea if you spoke to him.

"But you had better do it if you want your actor to keep that job."

Very often when you get a call from the actor and you have to call the producer, you are in a very difficult position because that may be the very same producer you are negotiating with on another show or for another client and here you are be-

coming the heavy.

You are complaining, you are fighting for your client's rights, and this producer is just two hours from talking to you about some money on another one of your clients and if he gets angry enough, you get this feeling, "Well, who needs to deal with her? She is nothing but trouble."

Q Again, dealing with Equity, is the rehearsal pay when the show is out of town that the actor receives, do you get any commission on that pay?

A No, we do not.

Q Do you have or have you on occasion, negotiated out of town expenses for an actor as part of his contract?

A Yes.

[98] Do you receive commissions on that?

A No, we do not.

Q Has it ever occurred that one of your actors, one of your clients, is dropped from a show while it is still out of town?

A. It has happened.

Q How much he paid you in commission when he is dropped?

A Nothing.

Q Moving along in the cycle, is there a time when a show begins to show out of town when an actor has pay from which you are able to collect a commission?

A If it is above scale I am able to collect.

Q Would you explain exactly what you just said?

A As we went back, if it is a client whose a new client and is only -- and only capable of earning scale as his wage and wants to do that production, even when the show opens and he is collecting full salary which is $500, I believe, $35 out of town now, we are not allowed to collect any money.

And I think the thing that is so bothersome to me, the reason I am here, is

that $535 or even $350 or $400, is not a minimum wage. I don't make that money at all.[99] THE COURT: What is not a minimum wage?

THE WITNESS: $535 to my mind is not a minimum wage. Yet that is a minimum wage to an actor on the road.

THE COURT: He has to get at least that under the Actors Equity contract you are saying?

THE WITNESS: Yes.

THE COURT: When he is on the road, he has to get $535?

THE WITNESS: I believe it is 35.

THE COURT: 535 a week?

THE WITNESS: Yes.

Q And for which under Equity rules, how much commission comes to you?

A Nothing.

THE COURT: Let me see if I understand this: That minimum has been set as a result of negotiation by Actors Equity with

the producers' group, is that it?

MR. DONELAN: Exactly, your Honor.

THE COURT: Those minimums.

What about the other conditions of employment, have those also been set, minimum conditions of employment?

MR. DONELAN: Yes, Your Honor. We have the collective bargaining agreements in the entire text here as plaintiffs' exhibits, and intend to have these identified [100] so the Court will have them.

But I think the Court has already in essence, gotten really all you need out of them, which is yes, all the terms and conditions right there in the collective bargaining agreement, and they have, by "they," the defendants have agreed in the stipulated facts, that no actor, no agent, no producer can diminish the minimums called for in the collective bargaining agreement.

THE COURT: I am talking about other

than the salary.

These other minimum conditions have been negotiated by the union?

MR. DONELAN: I am not sure which minimum conditions you are talking about, your Honor.

THE COURT: That is what I was getting at. In addition to a minimum salary which must be paid if you work in New York.

MR. DONELAN: Yes, your Honor.

THE COURT: It is 535 if you are on the road.

* * *

[127]Q By "call the rule," does that mean you terminated their relationship with Equity?

A I suppose on a general basis we terminated our relationship with Equity and at that moment technically we were unfranchised, or disenfranchised.

Q Why did you take that decision?

A Well, because it seemed -- it seemed

the situation was getting worse. I was being -- I felt -- forced out of business. I was being asked to work for nothing, and if I have to work for nothing I really can't keep my agency going.

Q What do you mean "work for nothing"?

A Well, the rules as they exist say that I cannot collect a commission on scale employment and since I don't represent major stars or that many people that command over scale, no matter how hard I try to get it, the bulk of my clients who are beginners, who are people moving along in their careers, can't command more than scale, so basically if I wish to work in the Equity field, and it is important for me to work in the Equity field if I want to represent [128] clients totally, I must work for nothing. I must put in the time and the effort and the energy, the same amount or more than would go into somebody who is recognized, and not get anything in re-

turn, even when I get them a job.

Q Were there other features of the Rule A which you objected to when you terminated your franchise in 1977?

A Yes, indeed. Aside from working for nothing, there is the one-year limit on a contract. If you get a new performer who comes to you for representation, you are only allowed to sign him or her for one year.

In that one year you can really start the career going perhaps, at least you might make them known, but at the end of the year they have the right to break that contract with you and go to another agent.

It may just be at the point where the career is going to break and you are out.

The one year rule isn't fully a year rule either. It isn't a one year guaranteed, because there is a 90 day clause under Rule A, and if you don't get a client work in 90 days where he is paid he

has the right to break his contract with you, too.

Getting him work is literally getting him work. It doesn't matter how many auditions you've sent him [129] out on or what promotion you've done or the jobs he's failed to get, he actually must be paid. If he's not he can call the 90 day rule and your client is gone, if he so desires.

Q Were there any other features of Rule A to which you objected?

A Well, I object generally to having an outsider run my business. The union has a collective bargaining agreement with the producers that take care of their actors.

I am employed by the actor. I mean, I don't work for the union and I don't work for the actor -- for the producer.

I work for the actor. He comes to me for his services. He comes to me the way

he would come to an accountant, the way he would come to a lawyer or a dentist. He wants my services. I think he has that choice.

Yet, it is an outside force that is telling me how I can deal with that actor. It's not a one-to-one decision and I am not free, as any other businesswoman in the country is free, to run my business as I see fit under the laws of the country or the state.

Q Mrs. Raider, did you say this at TARA meeting?

A I sure did.

[130]Q Did there come a time when you became dissatisfied with the TARA negotiators?

A Yes.

Q When was that?

A I would say that was in, what, well, around 1977 going into '78.

Q Who were these negotiators

you are discussing?

A The same group that I mentioned before -- may I go back? I also felt personally that the TARA negotiating group was headed by Howard Hausman, who is a fine man, but Howard Hausman was not speaking for the smaller agents.

Howard Hausman, I believed, was speaking for the large agencies. It's part of his job, I presume.

When I say that the negotiating team, after having been told by the membership, the general membership, that we could no longer live under these rules, we had to get commission on scale, we had to make some headway with this union, Howard would go and we would hear there were private meetings and he would always come back and say, "Well, you can't do this and you can't do that, you can't do the third thing." And I believe that you have to try.

So I became terribly pessimistic about my [131] chances of continuing in business and staying in a group where my views were not being expressed. I had to get out. It was a matter of principle.

Q Did others get out at that time?

A Yes, indeed.

Q Who were they?

A They were the smaller agents, some of the plaintiffs in this lawsuit, plus others.

I really can't tell you how many got out. I know the ones that are members of NATR, but I do not know how many others could not stand it.

* * *

[133] Q Have you ever heard of a pink contract?

A A pink contract is a chorus contract.

Q Was there anything about chorus contracts to which you objected when you were negotiating or talking about negotiating with Equity?

A It is not the chorus contract that I object to per se. What I object to is in Equity the pink contract, which applies to chorus members, does not ordinarily affect me because I don't represent chorus members. Chorus members traditionally don't have agents because they do not pay commission and they go from show to show more or less on their own.

A white contract is a principal contract and a principal contract is one in which you can negotiate for as much as you can get above minimum wage.

Very often, if you are lucky, you will get [134] more than minimum wage for an actor.

If an actor goes into a production on a white contract as a principal, Equity has the right unilaterally, by its own decision, to say, "Well, now, that person really is not a principal role. It's

really a chorus part." And they can unilaterally convert the white contract to the pink contract.

Your actor keeps the negotiated amount of money. He gets the benefit of the dollars that you negotiated. He does not go back to minimum salary but you are not allowed to collect a commission on a pink contract.

In one instance -- I'm going to go back about nine years -- I had a client in an industrial show, a show, a musical that was promoting automobiles, and it was touring.

As I remember -- I don't remember what the minimum was, but my client was well above the minimum and he was collecting $400 a week, which was very good money in those days.

After the second week that the show was running, an Equity deputy saw the show and said my client was not a principal player,

he was a chorus player. They converted the contract to the pink contract, and I had [135] to return the money I had collected the week he had played as a principal and could not collect any more -- it was an eight-week tour -- could not collect another penny on that contract even though my client continued to receive well over minimum. That is why I object to the conversion of pink to white -- white to pink

[136]Q Mrs. Raider, do you recall exactly when you resigned from TARA?

A No. Not the exact date.

MR. DONELAN: Plaintiff's Exhibit 67.

Q Let me ask you if that document refreshes your recollection, yes or no, as to when you resigned from TARA?

(Pause.)

A August 31, 1977.

Q August 31, 1977 Talent Representatives, your agency, resigned from TARA for the

reasons that you have just stated; is that correct?

A That's correct.

Q Were there others who resigned at that time?

A Yes, many others. There is a list of agents there.

Q After you resigned from TARA, what happened to your working every day with Equity members?

A Well, after we resigned from TARA we started getting letters from Equity telling us that we were no longer franchised agents, we could not represent their clients, please be aware that our clients would be in violations of the rules, and so on and so forth.

What happened was, there was a barrage of [137] threats. First, very mild. But they started to get stronger and stronger.

We found, after we resigned from TARA,

that the most horrible thing that happened was that we were put on a blacklist to producers. And since the most important thing we have going for us in this business are our reputations and our rapport with producers, this was an extraordinarily damaging thing. Your name appearing on a blacklist, be it valid or invalid, leads people to question, why are you there, you know, you must have done something wrong.

Our clients, indeed, were also shaken because here they have confidence in their agent and trust, and all of a sudden they are aware that their agent, whom they have liked and respected, again, is on a list. And it is damaging. It is damaging to your relationship with clients. It is damaging in the most insidious way, because there is nothing you can say to a blacklist, except explain it; which takes a lot of time. And it's difficult

to explain something in this situation.

Q These letters that you got, let's make sure we have the sequence correct on this record.

Prior to the publication of this blacklist [138] did you receive letters from Equity concerning your status as a non-franchised agent?

A As I remember, we did not receive any letters from Equity until we resigned from TARA.

Q After you resigned from TARA you received these letters that you have been talking about; is that right?

A Yes. And also copies of letters to our clients. Not only letters directly to us, but letters to our clients.

Q Who signed the letters to you, an agent from Equity?

A I believe it was Harriet Slaughter.

Q Who is Harriet Slaughter?

A I don't know her exact title. I think she was assistant to Don Grody.

Q Were these letters on the Equity letterhead?

A Yes, they were.

Q Did you see a copy of the blacklist letter?

A Yes, I did.

Q Was that on the Equity letterhead?

A Yes, it was, as I remember.

* * *

[170]Q You stated on your direct examination that there were three persons in your office who act as agents; is that right?

A Correct

Q How many of them work in the Equity field?

A I work in the Equity field primarily; my partner Steve Kaplan has worked in the Equity field; Ruth Lehner does not.

Q In 1978 how many jobs did you obtain for clients in the Equity field, you or your agency?

A I don't remember.

Q Was it more than three?

A I think possibly more. It might have been more like five. I'm not sure in '78, but I would say between three and five.

Q Who were those actors?

A I believe Tony Craig was one actor. I'm not sure of dates, there was -- Lanie Norton in Angel.

Q So you did get the job for Lanie Norton in Angel?

A Yes.

Q Were you paid commissions on it?

[171]A Yes, I was.

Q Did you negotiate over scale or scale for that role?

A Over scale.

Q How about Tony Craig?

A Well over scale.

[172] Q You said there were approximately between three and five --

A If I remember the year. Barbara Rodell, possibly Donald May. I am really not sure of the year, Miss Bases.

Q What job did you get for Barbara Rodell?

A She did a production of Two For The Seesaw at the Fishkill Playhouse, with Donald May.

Q Did you get those actors over scale?

A Yes, I did. There was also Forrest Compton in Sleuth, again, Fishkill Playhouse.

Q Did you get him over scale?

A Yes.

Q Turning your attention to 1977, approximately how many jobs in the legitimate theatre field did you obtain for your clients?

A I don't remember. And I want to state clearly, some of these jobs may have been

'77; I'm not good on the years.

Q Was it about the same number as in 1978?

A I have a feeling that probably '77 was more.

Q How about 1976?

A I don't remember.

Q Again, was it more or the same?

[173] A. I don't remember.

Q When was the last time you went to see a client in a legitimate theatre production on the road, outside of New York?

A The very last time was June or July of 1978. I believe it was Tony Craig at the Pocono Playhouse, doing Barefoot In The Park.

Q When was the time before that?

A Fishkill, New York; four or five trips to Fishkill for both Two For The Seesaw and Sleuth.

Q When was that?

A Well, I said I'm not sure. Probably

'77.

Q When was the time before that?

A Oh, I don't remember.

Q Were there any other times in 1977?

A I can't pinpoint the year. I can't say.

Q Which of your clients have you negotiated only scale for in the Equity field?

MR. DONELAN: I wonder if we could have any kind of time frame on that, your Honor.

Q When was the last time you negotiated scale for a client in the Equity field?

A Mel Cobb, in Semmelweis, a Kennedy Center production.

[174]Q When was that?

A '78.

Q When was the time before that?

A I can't remember. I know that they exist, but I can't remember specifically when and who.

Q When was the last time you went to Chicago to see a client in a legitimate theatre production?

A I haven't been to Chicago in years.

Q How about Atlanta?

A I have never been to Atlanta.

* * *

[180] Q Mrs. Raider, you stated that you have no written agreement between the actors you represent in the legitimate theatre field and your agency with respect to the relationship between the actor and your agency since you have ceased abiding by the Equity regulation; is that correct?

A Correct.

Q Are you aware of Article 11 of the General Business Law of the State of New York?

A I am aware of it, yes.

Q Have you read it?

A Not thoroughly, no.

Q When is the last time you read it, even not thoroughly?

A Not thoroughly, when we were licensed and received all this information.

Q This was in 1964?

A 1964.

Q Are you aware that the New York General Business Law requires you to have a contract with or [181] furnish a written statement to an actor for whom you obtain work, setting forth, among other things: the commissions which you charge?

MR. DONELAN: Objection, your Honor. It calls for a legal conclusion. The statute is for the Court to decide what it means.

THE COURT: Let me hear the question, Mr. Reporter.

(Question read.)

THE COURT: The question is whether the witness is aware of that?

MS. BASES: Yes, your Honor.

THE COURT: She can answer that. That doesn't call for a legal conclusion. Only ask the witness to tell us whether she is aware of it.

A Yes, I am aware of it.

Q What have you done to comply with this?

A Well, the terms of the employment are clearly stated on the contract between the actor and the producer.

Q What about the terms of the commissions which you charge?

A The terms of the commissions which I charge have been discussed with the actor verbally and a record of the commission is kept on a card in my file in the [185) office.

Q Is there anything you give the actor at the time you are making your verbal agreement with him or her which states the commission you will charge for the employment you procure for that actor?

A No, there is not.

Q You stated on direct examination that after being signed to your agency for one year which is the maximum allowed by Actors Equity Association under its agency regulations, clients often will go to one of the giants; is that correct?

A That is correct.

Q Who are the giants you are referring to?

A William Morris and ICM.

Q When is the last time you had a client signed to you for whom you procured work in the equity field, who has at the termination of an exclusive management contract between you and that client, gone to ICM or William Morris?

A I have not had an exclusive management contract with Barbara Rodell. We have had an exclusive agreement, again, a shake-hands agreement, for almost 14 years. On the

basis of that agreement, at one point she decided to try another agent; did for a [183] year, and came back. And in December of 1978 went and signed with William Morris.

Q So this was not a one-year relationship you had with Barbara Rodell, it was a 14-year relationship?

A Yes, it was.

[184]Q And after 14 years she decided to go to William Morris?

A Yes, and she's also decided to return to me.

Q Then when is the last time you have lost a client to William Morris who had been signed to you and an exclusive basis for a year and for whom you had obtained work in the Equity jurisdiction?

A I think the last one was Dennis Allen, who appeared in "How To Survive An Election," off-Broadway, no commission, 19 -- perhaps

'68 or '69; again, not certain of the date. Went to William Morris.

Q I believe you testified on direct examination that your business, after the dissemination of what you describe as the blacklist, fell off, is that right?

A Yes.

Q And the blacklist was disseminated in -- or what you describe as the blacklist was disseminated on December 27, 1977, is that correct?

A If that is the date, yes.

Q Isn't it a fact that in both 1977 and 1978, when the effect of this alleged blacklist would have had its impact, that your agency did exactly the same amount of business in the Equity jurisdiction, namely, one per cent?

A That could be true.

[185]Q Did you not submit one response to requests for discovery, that figure to your counsel?

A I did in deed. That is just the top of the iceberg, though. I don't know the business I didn't get because of that blacklist.

MS. BASES: I would ask that that be struck as nonresponsive, your Honor.

THE COURT: Yes. The question was "Was that the figure you submitted to your lawyer?"

Q Was that the figure you submitted to your lawyer?

A Yes.

* * *

* * *

[272] Q Yes.

"A They wanted ten per cent commission on all engagement procured by agents through the run of those engagements. It was the main demand."

Was that your testimony?

A I presume so. I mean you are quoting it from --

Q Page 91 of your deposition.

A Fine. If you press me to what I would consider to be the main economic demand, I'm sure that's right.

Q I don't mean to press you, Mr. Hausman, I'm just asking you for an honest answer as best you can recall it.

A Really all my answers are honest, sir, to the best of my recollection.

Q To the best of your recollection, was there a

main demand made by TARA during the negotiations with Equity?

A It has certainly been the position of all agents throughout that agents should get paid for their services. Everyone in the agency business thinks they ought to get paid for their services.

There was a period when we were asking for [273] something more than 10 per cent but I think in the minds of most of us at least 10 per cent of whatever the actor earned would have been a satisfying solution.

We didn't arrive at that solution. We have been very happy with the result.

Q And the ten per cent, that covered scale jobs?

A It would have covered any employment procured by an agent for an actor, whether it was for $20,000 a week or for scale.

Q Were there a number of TARA agents who were particularly concerned about

getting ten per cent or any commission on scale jobs?

A I would say all TARA agents were. All TARA agents were, yes, there were a number, all.

Q And William Morris itself was in favor of getting ten per cent across the board, including scale jobs, is that correct?

A We were and we are.

Q When TARA terminated Rule A in January of 1977, were virtually all members of TARA united in their desire to obtain ten percent across the board?

A I would say all were.

* * *

[281] We all consider that Equity's point of view was indefensible, outrageous, horrible, wrong, simply because they were expecting agents to subsidize the lowest paid actors, somehow to work for them without any way of getting paid.

We still all feel that way. We accepted a deal under which that was imposed on us. That is the way in which we accepted it.

Q I believe you testified that you were unhappy with the final agreement between TARA and Equity?

A That is what I just said.

Q Specifically, what points are you unhappy about?

A That's one.

Q When you say "that's one," I'm not sure what you mean by that?

A The failure to be able to get commission, at least 10 percent commission, from all the earnings of the client that you place when you place a client, whether that is at scale or at any rate.

* * *

TRIAL TESTIMONY OF DONALD GRODY IN THE DISTRICT COURT

* * *

[465]Q Mr. Grody, what was the situation which led to the formulation by Actors Equity of its agency regulation system initially?

A Well, the actor is a very vulnerable creature in respect of anybody who either employs him or who assists in getting him employment, and there were no regulations of any kind dealing with the activities of the middlemen, the agents.

And so before there were any regulations, before Equity began to take action in the area, agents -- actors were fair game for agents; there were no restraints on what commission would be charged; there were no limitations on the arrangements that could be made which were inflexible insofar as the actor was concerned, and not very favorable to the actor.

Seeing a necessity for moving in and getting rid of some of the abuses which had been practiced on actors, extracting large sums of money from them, getting money paid in advance and so on, it became apparent to the governing body of the union that some arrangement, an orderly arrangement, was necessary in order to protect the actors in this particular area.

* * *

[468] THE COURT: I'd like to ask you a question which might clarify this for me.

Do the producers deal only with agents or do they deal with anybody who might walk up to the door looking for a part?

THE WITNESS: Obviously a producer can deal with anybody. There are, however --

THE COURT: The question is whether they do as a matter of practice deal only with agents.

Do you understand the difference?

THE WITNESS: Yes.

Well, it's really hard to answer the question completely, your Honor, because different producers have different practices.

I would say mostly producers will with agents. The nature of the business requires that they deal with agents. There are --

THE COURT: That's what I was getting at, whether the industry as such, the way it has developed, that as a practical matter producers seek employees through agents, or actors and actresses through agents; is that the way the industry operates?

THE WITNESS: It does, your Honor.

* * *

[614] Q Mr. Grody, when an Equity obtains a job with a producer who is a party to a collective bargaining agreement with Equity, the producer and the Equity actor into an individual contract: is that correct?

A Correct.

Q The producer is then required to pay directly to the actor the agreed upon wages set forth in that contract?

A Correct.

Q That is true even if the actor has an agent?

A Not necessarily.

Q Unless the actor consents in writing to payment to the agent, is the producer required to pay the actor directly?

A Yes.

* * *

[636]Q Mr. Grody, are you familiar with particular kinds of abuses that the agency regulations were designed to correct, which have been committed by agents in the recent past?

* * *

[637] The specific situations that I can recall have to do with, for example, an agent on the West Coast, Ruth Webb, who, while she was representing our members as an agent, also acted as a packager of a play.

[638] When we found out about that, we proceeded under the terms of the agency regulations and ultimately became involved in an arbitration where it was resolved that the agent, under the rules, had no right and, indeed, was prohibited

from collecting agency commissions at a time when she was acting as a packager of a play, and the order of the arbitrator required the agent to return to our members the commissions she had extracted from them.

That kind of situation has existed for many years and I expect will continue to exist, and therefore the prohibition against it is one of the necessary ingredients to any franchising system.

Another situation occurred with an agent here in New York who was requiring our members, her signed clients, to use the services of a particular photographer and to require that the head shots, which is a group of photographs that are put together, be prepared in a particular fashion.

When we learned of this we com-

plained of the activity of the agent and suggested that if that activity were not stopped we would have to take away the franchise, and the agent complied with our requirement.

Another specific situation occurred in the case of Michael Hartik, who was a franchising agent who [639] tried to extract -- tried to get our members to sign agreements which called for a commission of 10 percent from the first dollar.

When we learned of this, and had evidence of it, we brought it to the attention of Mr. Hartik and proceeded then to revoke his franchise.

At that point he advised us that he had reconsidered and that he would abide by the Equity regulations and would not seek to sign members to a contract requiring a 10 percent commission, and we restored his franchise.

There was also a fairly recent situation that occurred at the Meadowbrook Theatre, a dinner theatre in New Jersey, just across the bridge, where an agent acted as a casting director for a particular production at the Meadowbrook Theatre.

Actually, it was a sub-agent of the agent who had been franchised, although the sub-agent also gets an Equity franchise as a sub-agent.

What happened in that situation was the casting director, the agent, would not make submissions for that play -- would not cast anybody unless they agreed to become aligned with that particular agency.

So that on the one hand he would be -- the [640] agent was working for the employer in being his casting agent, and at the same time he sought to extract commissions from our members for placing them

in the play.

That is a prohibited activity under the Equity agency regulations and we advised the agent of that improper practice and the agent, having -- I'm not sure whether he actually took the commissions and returned them or whether the practice was stopped immediately, and he said that he would not try to collect the agency commissions.

THE COURT: He was a franchised agent?

THE WITNESS: Yes. If he were not a franchised agent, your Honor, I don't know what action we could have taken against him.

THE COURT: You are suggesting that franchised agents are prohibited from acting also as producers or agents of producers in another capacity other than recruitment? Is that in the regu-

lations?

THE WITNESS: Yes, yes, your Honor.

THE COURT: All right. Now I understand why we are bringing this out.

MS. BASES: Just to clarify that:

Q Is an agent totally prohibited from functioning as a casting director or is he regulated in some way if he [641] does act as a casting director?

A The prohibition is not total. The regulation applies only in that instance when the agent acts as a casting director.

For that period of time, or during that period when he is in fact in the employ of the producer, we do not permit him to extract an agency fee, since obviously he cannot properly represent an actor if he is acting for the employer.

THE COURT: All right.

Q In connection with this incident, did the casting director inform the director indirectly of the availability of the actor, if you recall?

A Well, what we have learned is that anybody who was not -- who would not agree to be aligned with that particular agent, who was acting as a casting director, would not get a submission and, indeed, actors who were available for work were told by the agent acting as a casting director -- I'm sorry, the agent acting as a casting director told the producer or director of the play that certain actors were not available when in fact they were.

* * *

[642]Q What does Equity do with the franchise fees it collects from agents?

* * *

A The money that we collect from

the franchising system is deposited in general funds.

Q What is it used for?

A It is used for the administration of the Equity agency regulations.

Q What does the administration of the Equity agency regulations involve in terms of salaries and functions and costs to Equity?

A Here in New York we have one person who is involved full-time in maintaining the agency files, in responding to innumerable telephone inquiries from producers, from agents, from actors, concerning the status of one or the other.

Producers constantly call up saying, who represents so-and-so actor, or agents will call up and say, is so-and-so actor represented. There are constant [643] inquiries.

There are the usual provisions,

usual requirements of the individual employment contract coming in with the name of an agent. That has to be checked against the file to see that there is in fact an agency contract on file for the member.

The maintenance of all the records because they are so comprehensive. we have had to get -- this is in New York City -- a IBM machine called an OS-6, which is a word processing machine which costs us $685 a month, on which we are putting all the agency files, so that we will be able to provide a better service to producers, to agents, and to members who make inquiries about actors who have agents.

Then there is, of course, the salary of the one employee in New York which, with fringes, is probably around $15,000.

We also have agency functions to be performed in Chicago, where we have an office, and in Los Angeles, where we have

an office. Indeed, the activity in Los Angeles because of film and television, is very substantial.

The same kind of work is performed in those two offices. I would say -- oh, and in addition, of [644] course, when I was talking about New York City I talked about the one employee who was directly assigned to that problem, yes, the agency regulations.

In addition, one of my colleagues, Guy Pace oversees the agency area and I am, of course, and have been for some time very much involved in the area.

I would have to say in terms of our cost to us in running the, administering the agency rule, the Equity agency regulations, I would think that the cost to us would have to be somewhere in the neighborhood of forty to fifty thousand dollars a year.

Q Do these costs exceed the intake from the franchise fees?

A By far.

Q Would these costs exceed the intake from the franchise fees even if there were none of the duties associated with the current agency dispute that had to be done?

A I would say definitely yes.

* * *

[661]Q During the negotiations with TARA, did TARA question the need for the increased franchise fees that Equity had requested?

A No, I don't believe so. I think we explained [662] that the franchise fees had remained the same for almost twenty years, that is, the initial application, the franchise fee and the annual payment, and that we thought it was time to have an increase in the franchise fees. They did not seriously resist that. My impression

of the response was, if we can put everything in place, we will agree that there should be an increase in the franchise fees.

* * *

TRIAL TESTIMONY OF ROBERT FISHKO IN THE DISTRICT COURT

* * *

[665]Q Mr. Fishko, what is your occupation?

A I am a theatrical manager and producer.

Q Are you a member of the League of New York Theatres?

A Yes.

Q How long have you been a member of the League?

A Since 1968.

Q Approximately how many plays have you produced or been involved in in the production of?

A Oh, a couple of hundred.

Q Approximately how many actors have you hired during the course of your career as a producer?

A About 1500.

Q Approximately what percentage of those acts were hired for principal roles in your productions through a theatrical agent?

A Of the number of actors, more than half were engaged for principal roles. And of those, I would say 70 or 80 percent were hired through agents.

[666]Q By principal roles, am I correct in understanding that a non-chorus role is considered a principal role?

A Yes.

* * *

[667] Q Approximately how much time is spent with each actor who appears at that principal interview?

A A minute or two.

Q Is it fair to say that only a small percentage of actors are generally asked to come back for a reading?

A A small percentage, yes.

[668]Q Do you frequently in the course of your work as a producer receive calls from agents about actors they are submitting for roles?

A Yes, I do.

Q And do you speak to those agents directly when they call you?

A Frequently.

Q Do you also get calls directly from actors and actresses?

A Yes, I do.

Q And do you generally speak to them?

A. Sometimes. Not usually. Generally if the call is directly from an actor who I don't know, they are invited to send a picture and resume in and I will look at it later.

* * *

[680]Q Have you been asked by agents to pay an actor more than the minimum or

scale salary in order that the agent can obtain a commission?

A Yes.

Q Have you done so?

A At times, yes.

* * *

[682]Q So one could have a principal role even though [683] his part by layman's standards would be a very small part in the production, is that right?

A Oh, yes. Virtually any speaking part is a principal role.

Q Any speaking part.

* * *

* * *

[709] Q What is your profession?

A I'm an actress - singer.

* * *

[711] Q As a principal performer, do you need an agent?

A Yes, I do.

Q Why do you need an agent?

A I need an agent to be able to audition for shows, because otherwise I couldn't get -- I couldn't be seen by the directors or producers.

Q Have you tried to see producers without an agent?

A Yes, I have.

Q Have you ever been successful?

A No.

Q Have you gone to principal interviews?

A I very rarely go, because I

think it's a waste of time.

Q Why is it a waste of time?

A So often you see a secretary or stage manager, and your picture winds up on a pile of other pictures, and you are never called.

Q How do you get your work in the legitimate [712] theatre field?

A I am submitted by an agent for an audition. You go and you audition. Sometimes you have a callback, and you get the job.

Q Is the principal interview the same thing as an audition?

A No. You are just seen by someone who talks to you as to your experience and what role you might be interested in as far as the show is concerned that they are casting.

Q Do you get a chance to show your talent at a principal interview?

A They do not give you that much time. It could be anywhere from a minute to three minutes that they talk to you.

* * *

[715] Q Have any of them represented you in the legitimate field recently?

A Yes.

Q Who?

A Marje Fields.

Q How did it come about that Marje Fields represented you in a legitimate theatre production?

A The end of January I was called by a Miss Dorothy Scott, who is a sub-agent in the Marje Fields office.

Q What did she call you for?

A To audition for a show called Blues In The Night. I had two auditions and I got the show.

* * *

[715(A)]Q How had you been submitted for

this show?

A I had been submitted by Miss Dorothy Scott of Marje Fields Agency.

[716] A I had been submitted by Miss Dorothy Scott of Marje Fields Agency.

Q Why?

A I had been submitted because I was put on a list of people to stay by the producer, who was Sheldon Epps.

Q Did Miss Scott negotiate your contract?

A Yes, she did.

Q What salary did you get?

A $250.

Q Is that over scale?

A Yes, it was.

Q Was that much over scale?

A No, it was not. It was enough to pay the commission.

* * *

[724] Q Mrs. Britten, when you obtain a job at Equity, who pays you? How does the

pay work?

A The producer pays me.

Q In what form? Is that a check?

A Can be a check or it can be cash.

Q Who receives that check?

A The talent receives the check. Myself.

Q You get the check?

A Right.

Q And then if there is a commission, you pay that yourself?

A If there is a commission, it is my duty to pay the agent.

* * *

* * *

[749] Q Miss Lea, what is your profession?

A I'm an actress and singer.

Q Are you a member of Actors Equity?

A Yes.

Q How long have you been a member?

A About 17 or 18 years.

Q Do you work in the legitimate theatre field?

A Yes, I do.

Q Do you do a lot of work in the legitimate theatre field?

A Yes. That is my main field of activity.

Q Have you worked in the legitimate theatre field without an agent?

A Yes.

Q Have you worked in the legitimate theatre field [750] with an agent?

A Yes.

Q Are you currently signed on an exclusive basis with a theatrical agent?

A Yes, I am.

Q How long have you been so signed?

A Just about three years.

Q Prior to being signed with this agent, were you signed with any other theatrical agent?

A No.

Q Did you work with any agents on a free-lance basis?

A Well, a little bit, when I could get them to represent me. But I wasn't very successful in getting free-lance representation.

Q How did you try to get free-lance representation?

A Well, I sent pictures and resumes; I invited agents to performances that I would be giving in the New York area; and in fact, at one time, I believe it was early in 1976, I took the whole list of agents and started to go right down the list geographically to every single agent's office. I didn't get all the way through the list because I got in a good showcase at Equity Library [751] Theatre and had to stop for rehearsals.

Q When you say you invited agents to your performances, did anybody request you to do that?

A Yes. Sometimes on the rare occasions when I was successful in getting to see an agent or someone in an agent's office, often they would say, let me know when you are doing something in town.

Q And would you let them know when you were doing something in town?

A Yes.

Q Would they come?

A I didn't find that they did, no.

Q How would you know whether they came or not?

A There would always be a list of what agents had attended.

Q You state that you have been signed to an agent for the last three years?

A Yes.

Q Is that an Equity franchised agent?

A Yes.

Q Has your relationship with your agent affected your ability to get work in the Equity jurisdiction?

A Yes.

Q How has it affected your ability to get work?

[752] A Well, I have gotten a lot more

auditions and auditions with a lot better people, rather, with a lot more important productions or producing organizations.

Q When you say a lot more auditions, what kind of auditions have you gotten that you had not gotten prior to being represented by an agent?

A Several Broadway auditions, for the main thing.

Q Had you attended principal interviews?

A Oh, yes. Yes, by the dozen.

Q Did you ever get an audition from a principal interview?

A Yes, I did, but for smaller summer stock companies and dinner theatre occasionally. Not ever for a Broadway, or I think off-Broadway production.

Q Have you attended principal interviews for Broadway productions?

A Yes, yes.

Q From the years 1972 to 1976, approximately how many principal interviews for Broadway productions did you attend?

A I would say maybe 30. 25 or 30. It's hard to guess.

Q This is just for Broadway productions?

A Just Broadway, yes. It's hard to separate [753] them in my mine from non-Broadway. It seemed I was going all day, every day.

Q Did you get an audition from any of them?

A No, I didn't.

Q Since you have been represented by an agent have you gotten any Broadway auditions?

A Yes, several. Probably at least six, maybe eight or ten.

Q How long is a principal interview?

A Well, you mean how long is each

individual scene in a principal interview?

Q Can you describe the principal interview process very briefly?

A Yes. The principal interviews are set up, I think they are now three days, but at the time that I was doing them they were two days. Two eight-hour days. And I would go very early in the morning, perhaps two or three hours before the principal interview started.

Q Why would you do that?

A Because there was such a long list of people waiting to be seen. There may be 500 people show up on each day and people just took to showing up earlier and earlier to get their name on a list so that they could then be given a card so that they could then either wait [754] to be seen or sometimes there would be three or four interviews in one day, and you'd run from one to the other and back and forth, and, you know, is my number coming up here yet, or up here.

Q And when you were seen --

A When you were seen you would have maybe a couple of minutes.

Q Did you get to perform?

A No. That was one of the bad things about it.

Q How is an audition different from a principal interview?

A In an audition you do at least to some extent perform. I think there is no similarity, really, because one is just presenting yourself and one is working with a script. And working with a script is totally different. I don't think there is any way to assess capability from an interview.

Q Aside from these Broadway auditions which you have gotten with an agent, which you were unable to get through the principal interviews without an agent, are there any other examples you can give of how an agent has helped you get auditions

you could not get before having an agent?

A Well, yes. One of the main things that sticks [755] out in my mind was the Goodspeed Opera House.

Q What is the Goodspeed Opera House?

A You could call it a summer stock theatre, although it was about a six-month season. It's in Connecticut and it's a theatre where New York agents and producers very frequently attend the performances. They produce musicals only, three a season, and many of their works happen to come to Broadway.

It has a kind of reputation as a Broadway tryout house.

Q Had you tried to get an audition with the Goodspeed Opera House?

A Yes, I had, for several years.

Q What had you done to try to get an audition?

A I had sent pictures and resumes with letters to the producer; I had attend-

ed principal interviews and had never gotten an audition out of them.

One year, in fact, I felt that possibly there were some very small roles that might have been cast out of chorus calls, and I went to chorus calls and was told that the roles, however, had previously been cast.

Q Did the situation change when you began working with an agent?

A Yes. When I was signed to my agent, I thought [756] there was something I was right for, I asked her to submit me, and I immediately got an audition and got the part.

Q In your contacts with agents have any agents engaged in any practices which you considered unethical or unscrupulous?

A Yes. There was one agent, in the mid-60's, the only agent at that time that seemed to be interested in submitting me for anything, and got me one or two little

things, or I got one or two little things through her. And she very, very strongly hinted that I should pay her more than 10 percent.

And really put quite a lot of pressure on me to pay her more than 10 percent, which I wound up doing.

* * *

[757] Q Did you pay her more than the 10 per cent?

A Yes, I did.

Q Did you complain to Equity?

A No.

Q Why not?

A Well, I really was afraid. She was the only one at that time that was sending me out on calls, and I just didn't want to blow that little connection, small though it was.

Q Has any other agent you have dealt with engaged in any practices which you consider unscrupulous or unethical?

A Well, there were a couple of attempted [758] "casting couch" episodes.

There was an occasion on which I think for no legitimate reason I was asked to return to the agent's office at 11 o' clock at night.

* * *

And there was another instance of actual chasing around the office, which was really -- you are right to laugh -- it really struck me as ludicrous at the time. Nevertheless, there it was.

The man was a notorious office chaser. I don't say that there are many such, but this was one.

* * *

* * *

[770] Q Mr. Bikel, what is your occupation?

A I am an actor.

Q How long have you been an actor?

[771] A Well over thirty years.

* * *

[773] Q Are you familiar with the principal interview system?

A Yes, I am.

Q Is the principal interview system in any way a substitute for having an agent?

A Oh, no.

The principal interview system was basically invented by Equity as a device of furnishing for the actor who is not represented by an agent some kind of modicum of access to jobs. But the sad fact of the theatre is that the access to jobs

is far better served by the fact of an agent's representation.

We do force, through the principal interview system, force a producer to see everybody whether or not they are represented by agents. But it is at best a poor substitute.

Q Are theatrical agents necessary only in New York?

A Oh, no. They may be even more necessary on the West Coast, because the cross-over between the fields of employment is greater, notably in television and films.

Q Would you tell the Court briefly what the [774] purpose of Rule A and the franchising system was?

A The purpose of Rule A is to protect the actor against possible abuse. Also, incidentally, to protect the agent, because under Rule A if an actor fails to fulfill his obligations to the agent, we

would compel the actor to live up to his obligations to the agent under the rule. It stops abuses by, or possible abuses by the agent, stops possible conflict of interest by an agent, where an agency might have an interest in an upcoming production and cast that production with its own clients and then collects from both ends; Rule A also protects the actor in the sense that it prevents indefinite or unreasonably lengthy ties to an agency, whether or not the agent does anything for the actor.

In other words, under Rule A, if for 90 days the agent did absolutely nothing for the actor, the agent under Rule A can be dismissed summarily by the actor.

Q Are there any other types of abuses which Rule A was designed to eliminate?

A Well, Rule A provides for an inspection of the agency by Equity, to make

sure that there are regular office hours *** kept, that everybody is being seen, that no underhanded business goes on. It prohibits exploitation, or sexploitation, as it is called these days, in terms of [775] the casting couch.

And it provides for a system of arbitration to resolve disputes which otherwise would have to be litigated.

Q Based upon your thirty-plus years of experience in the industry and familiarity with the agency franchising system, have you come to any conclusions with respect to whether the need for the system has changed in any way?

A It has not.

Q Does every job obtained by an actor depend upon the expenditure of time and effort by an agent?

A Actually, it doesn't. An agent very often is in a sense an order-taker.

He waits for the phone to ring and when it does, obviously he will negotiate for the actor. At times an actor will get his own job, and then the agent will negotiate a salary for him. The agent -- well, there are better agents and worse agents, but it does not necessarily depend on legwork or phone work by the agent whether or not the actor gets the job.

He can get better terms once he has the job, through the fact that he has an agent.

Q Are there ever situations in which the agent does virtually nothing and then claims a commission?

A Oh, yes, very often. In fact, when an agent [776] does nothing at all and yet the actor is still under contract to the agent and the actor has gotten by some way -- special contacts, being seen at a party or being seen in something else,

through direct contact with a new management -- if the actor receives an offer of a job, then that agent gets the commission for that job.

Q You mentioned a dispute-resolving mechanism.

Have you ever been involved in the operation of that process?

A Yes.

Q Would you tell the Court about that?

A For my sins they put me on the American Arbitration Association's panel as an arbitrator, and I once had cause to be called as an arbitrator in a case involving an actor and an agent where the agent claimed that she made one phone call-- in fact, the actor was Zero Mostel, and the agent claimed she made one phone call which years later led to Zero Mostel getting the role of Tevye in "Fiddler On The Roof," and she claimed commissions on

the entire run.

Q And you participated in resolving that?

A Yes.

Q In the normal practice in the industry, is there a certain calculated risk or gamble involved between the [777] agent and the actor?

A Well, yes. They gamble on each other. I guess the agent gambles just as much. If an agent signs up an actor at the entry level into the profession, he will say to himself, I suppose, "I am not so much out for my 10% of the $150 or $200 that this actor is likely to make tomorrow but I am interested in the $5000 salary that he may get the day after tomorrow, if he becomes hot." So it is the look toward the future that people gamble on.

* * *

[780] Q Based upon your knowledge and experience in the industry, your familiarity

with the needs of actors and their relationships with agents, have you come to any conclusions regarding what would occur if the franchising system were eliminated?

* * *

A I think utter chaos would result. What would happen would be no only that the abuses and possible abuses would be laid wide open. Also what I can see is that the other jurisdictions would suffer. The other entertainment unions would, in the wake of the franchising system being eliminated or destroyed, would have an incredible abount of litigative work to do on behalf of the actors. Because each time an infraction would happen between an agent and an actor, the courts would be swamped with such cases, where at present only the arbitration process is being called into being.

There might be far more exploitation of actors by agents who literally

work out of a cubbyhole or out of a [781] telephone booth who hold themselves out as agents.

Young actors, when they are hungry, grasp at anything. I see a very bleak future if there were no franchise.

* * *

TRIAL TESTIMONY OF GUY PACE
IN THE DISTRICT COURT

* * *

[792] Q Where are you employed, Mr. Pace?

A Actors Equity Association.

* * *

[793] A I am one of three executive assistants.

Q Do you have any duties in the agency area?

A I do.

Q What is your duty in the agency area?

A Generally, when I became involved with the agency dispute earlier this year, I was involved with matters relating to the problem with the nonfranchised agents.

And as I became officially the esecutive for administration, I replaced Mr. Randy Phillips as the person in charge

of the general workings of the agency department.

Q What are your responsibilities in terms of the general workings of the agency area, apart from the dispute between Equity and the nonfranchised agents?

A Generally the representative Betty Byrne, who handles that department, would report to me. I see to it that the daily workings, the clerical aspects of that function, are handled correctly, the filing of contracts, the handling of routine conflicts, disputes, those kinds of questions.

I am the liaison, the staff person for the agency committee. I would report to Council, our governing board, on matters coming from the committee.

In areas where there are questions of a policy nature, that would be reported directly to me. I would [794] make those decisions.

When there are disputes over whether a contract is properly terminated, once it is investigated by Betty, if there is a question, I would jump in on that.

Q What do you mean, "whether a contract is properly terminated"? What kind of a contract are you talking about?

A Within the terms of, say, an exclusive management authorization. There are very specific terms as to when an actor or an agent can terminate the contract.

I am thinking particularly of the 90-day clause.

Q You would resolve any questions about that?

A Any questions that would relate to that, if they were not routine.

Similarly, areas of problems with commissions. I can recall an agent sent us a letter saying that one of our members who was properly signed to him owed some

commission moneys. We investigated it and once I determined that the commission was properly owed, I pursued the member and effected the proper payment of the commission.

There are times when I would get involved with some problems, when a member goes back and forth to the Coast; we used to at one time have a policy where a member could have a contract on each Coast.

[795] That has been altered to the extent that only one contract can exist, but if a member wishes to use another agent on the other Coast, we would step in to make sure that each of the agents are aware of what is going on and that the permission is granted.

Q When you say "a contract on each Coast," are you referring to an exclusive contract?

A Yes. I am generally referring

to exclusive contracts. The specific contracts are for a specific show. These are handled fairly routinely.

Q Does Betty Byrne handle any questions involving discretion or exercise of discretion?

A No.

Q What kinds of questions in the agency area does she handle?

A Very routine. What would be the commission rate, who are franchised agents, what are the particular terms of the contracts. In any area of policy, Betty would not be permitted to get into that. So, for example, when the members have been recently calling to ask-- to voice their concerns about the dispute we have been engaged in, that would be immediately turned over to myself to handle

* * *

* * *

[765] Plaintiffs and defendants agree as follows:

1) The following 5 of the 23 plaintiffs negotiated no contracts in Equity's jurisdiction (i.e., the legitimate theatre field) from January 1, 1976 through October 31, 1978:

Tranum, Robertson & Hughes, Inc.

Raglyn-Shamsky, Ltd.

William D. Cunningham Associates, Inc.

H. A. Artists & Associates, Inc.

Don Buchwald & Associates, Inc.

2) A sixth plaintiff, Joe Jordan Talent Agency, Inc., derived only 1/10 of one percent of his income in [766] 1976, 1977 and the first half of 1978 from contracts negotiated in Equity's jurisdiction.

3) In a questionnaire sent to plaintiffs by plaintiffs' counsel pursuant to interrogatories propounded to plaintiffs by defendants, all plaintiffs were asked if they had ever asked any producers not to identify them as the agent who negotiated the contract for the Equity members.

(a) The following plaintiffs made such requests to the producers and the producers complied:

J. Michael Bloom Ltd.

Marje Fields Inc.

Lester Lews Associates, Inc.

Monty Silver Agency, Ltd.

Michael Thomas Agency, Inc.

D.M.I. Talent Associates, Inc.

Oppenheim Christie

STE Representation, Ltd.

(b) The following plaintiffs* did not make any such requests of producers:

Leaverton Associates, Ltd.

Talent Representatives

Bob Waters

Ann Wright Representatives

[767] Joe Jordan Talent Agency, Inc.

Tranum, Robertson & Hughes Inc.

Raylyn-Shamsky, Ltd.

William D. Cunningham Associates, Inc.

H. A. Artists & Associates, Inc.

Don Buchwald & Associates, Inc.

And there is a footnote to (b), your Honor, which states as follows:

*These include the 5 plaintiffs who did no business in Equity's jurisdiction and the plaintiff who did only 1/10 of 1% of his business in Equity's jurisdiction in 1976, 1977 and the first half of 1978.

(c) The remainder of the plaintiffs did not respond to the questionnaire.

4) The following plaintiffs have no

written contracts with actors for whom they obtained employment in Equity's jurisdiction (i.e., in the legitimate theatre field) during the period January 6, 1977 through October 31, 1978 (the cut-off date for discovery in this regard) containing the commission or fee to be charged by the agency to the actor for whom employment was obtained, and have no other statements, copies of which were furnished to the actor, containing the terms of employment and commission or fee to be charged by the agency to the [768] actor:

Bret Adams, LTD.

Oppenheim-Christie Associates, Ltd.

D.M.I. Talent Association

Henderson Hogan Agency, Inc.

Joe Jordan Talent Agency, Inc.

Leaverton Associates, Ltd.

Lester Lewis Associates, Inc.

Joel Pitt, Ltd.

Monty Silver Agency, Ltd.

Talent Representatives, Inc.

Jean Thomas Agency, Inc.

Michael Thomas Agency, Inc.

Jacobson-Wilder, Inc.

Ann Wright Representatives, Inc.

Bob Waters Agency, Inc.

J. Michael Bloom, Ltd. has contracts stating the commission to be charged (10%), with some but not all of the actors for whom it obtained employment in Equity's jurisdiction during the above-stated period.

* * *

* * *

[4] Q Are you a member of Equity?

A Yes.

Q How long have you been a member?

A Since 1955.

Q Continuously?

A Yes.

* * *

[8] Q By Rule A, I am referring to the present regulations.

A Present regulations are the Agency Regulations.

Q By Agency Regulations, I assume, we are talking about --

A That is the new title.

Q I assume we are talking about the regulations which govern agents, theatrical agents who perform services for Equity members?

MS. BASES: Off the record.

(Whereupon, a discussion was held off the record.)

Q Do you have any duties with respect to the Agency Regulations?

A Yes.

Q What are your duties?

A Now, that I am on the staff, my contact with whatever has to go down to discuss, whatever changes may be made and any liaison that has to be done with the representatives of TARA. T-A-R-A, [9] Theatrical Artist Representatives Association, Inc., whatever it is. And more spefically, to try and bring together into a form of a rule book those agreements that have been worked out.

Q You are aware that under the Agency Regulations, an Equity member cannot deal with a nonfranchised agent?

A Correct.

Q Do you have any duties with respect

to that aspect of the Agency Regulations?

A Yes.

Q What are those duties?

A Up to the present, it is sending out of a letter or seeing to it that letters are sent out. I don't actually do the paper work. But as I said, I have the oversee of everything that happens. So, therefore, I am not actually handling the work, but responsible that it is done.

Q You are responsible for the day-to-day enforcement of the Agency Regulations?

A That is right.

* * *

[29] Q Were you aware that there was a time when Equity permitted an agent to earn a commission on scale jobs?

A Yes.

Q When did that end?

A When we adopted the agency regulations, the new set of rules.

Q Are you talking now about 1958?

A No, I said agency regulations. Rule A precedes the agency regulations.

Q That would have been about October of 1977; is that correct?

A I think so, that is approximately right.

Q Prior to October, 1977, Equity permitted under Rule A agents to obtain a commission on scale jobs?

A Correct.

Q Was that five percent?

A It varied. There were some areas where no commission was permissible.

There were some areas where five percent of scale was permissible. There were some areas where [30] five percent of a portion of the minimum salary and ten percent of it was permissible. It depended on what contract area you were in.

* * *

[34]Q Wouldn't a letter also be sent to a member when it turned out that a production contract and the agent wasn't franchised?

A It is the same difference.

Q Theoretically, isn't it possible for an Equity member to enter into a contract with an agent who is not franchised?

A Not on our forms.

Q Why is that?

A When an actor signs a contract with an agent, he should according to our regulations do it on the forms that are submitted -- supplied by the union. If in fact he signs one of those forms with a nonfranchised agent, when that contract comes in, it is rejected because the agent is not franchised.

Q When that occurs, would the member be sent a letter of the nature you just described?

A Yes, again, that would be a form letter.

* * *

[69]Q What does Equity do with the franchise fees it receives from the agents?

A Put them into our general fund.

Q Are they used to cover the costs [70] incurred by Equity in administering the franchise program?

A There is no specific relationship between the monies that we receive for franchise fees and the cost factors that the union has in trying to administer that area.

Q Does the union know what its costs and expenses are in connection with its administration of the franchising system?

MS. BASES: By the "union", re you asking does Mr. Phillips know?

MR. BREINDEL: Well, whether Mr. Phillips or anyone else at the union, to his knowledge.

A. To my knowledge, no one would know. Other than the salaries involved and being able to maybe break down, if that were possible, which I doubt, the time of myself, Betty Byrne, my secretary, and any papers, typewriter ribbons, paper clips, etc., etc. Other than that,

no, and the forms that have to be printed.

Q To your knowledge, has Equity ever attempted to ascertain what it costs it to administer the franchising system?

[71] A There is no cost breakdown as to how much it cost to administer that area.

Q My question was: has it ever attempted to ascertain these costs?

A No.

* * *

* * *

[28]A I cannot at the moment recall spefic abuses. Generally, when abuses are revealed to us, circumstances are described by the actor, and we are advised of it only if we guarantee that the actor's anonymity will be maintained, because raising these issues in an industry as tight as ours is, could end up in an actor being black-listed or if not, very severely would his employment opportunities be affected. Actors are reluctant to discuss these things. When they do discuss them, generally, they do not want to permit any notoriety to be attached to it.

Q The black-list that the actors fear, would that be by the agents or the producers or both?

A Well, since we are engaged in a dispute with agents, if there would be one, it would come from the agents, not from the producers.

* * *

[148]Q Did Equity give TARA any reasons for which it sought an increase in the franchised fees?

A My recollection is only that it assisted us in helping to administer the area.

Q Administer the agency regulations?

A Yes.

Q What does Equity do with its franchise fees and initiation fees?

A Well, you described some of the things today, in terms of the checking that Betty Bryne does, responding to inquiries from producers, from agents, what members are doing, whether they are available. Really an endless thing. Betty Byrne's phone is ringing incessantly with

inquiries, where to find actors, is this actor signed by that agent, the producer wants to find the actor, is he still assigned to so and so agent. A great deal of her work is taken up to responding in getting employment for a member. [149]Q The franchise fees are used to pay Equity's expenses in this connection?

A To administer the area. We publish rule A, that is published at our expense, and is given out freely to agents. Whatever the costs are; the forms that we prepare and disseminate.

Q Was Equity's request of TARA that it agree to increase franchise fees and initiation fees based upon the fact that Equity's costs in administrating Rule A, increased?

A I honestly don't recall.

Q Has Equity done any studies or made any investigation to determine what

its costs are, in administering Rule A?

A No.

Q Did TARA question the need for increased franchise fees?

A I believe they did; yes.

Q Did Equity justify its request for increased fees?

A I honestly don't remember.

Q Did you --

A It was not a major issue in our discussion.

* * *

PETITIONERS' EXHIBIT NO. 3
IN THE DISTRICT COURT

[Theatrical Artists Representatives Association, Inc. Letterhead Omitted In Printing]

March 25, 1975

Actors Equity Association
165 West 46th Street
New York, N.Y. 10036

Attention: Messrs Theodore Bikel and Don Grody

Reference: RULE "A": REVISIONS

Gentlemen:

The members of TARA are deeply concerned about the present state of our business, with which all of us are only too painfully familiar. The cost of doing business in the legitimate theatre, like everything else, has risen sharply over recent years, and this is particularly true for those Agents who are primarily or even exclusively functioning on behalf of the members of Equity.

We are requesting a reopening of "RULE A"

for amendment, because this RULE A in its present form does not permit franchised agents to earn back the cost of operating an efficient organization in New York, let alone make a profit.

Many of our members doubt whether they can long continue in the field. Without naming names, we all know that many fine and trusted agents have deserted the ranks, either going into other fields such as personal management or moving to the west coast. Many of those who function now in the field of Equity get their living from other sources, such as commercials, occasional motion picture deals and so forth. Other agents have had to give up their independence and merge with bigger offices. But even the big and powerful agencies find it now unprofitable to handle work in the theatre, especially the representation of the average income earning Equity member.

If Equity wants its franchised agents to continue to function efficiently and effectively for those actors in the theatre who need the services of agents, and we believe these services to be more essential now than ever before, then the provisions of RULE A must be revised promptly.

Two years ago, representatives of TARA met with the Agency Committee to review this need, which was dire even then. Though the Agency Committee was sympathetic to the agents' problems, nothing tangible resulted from the discussions.

The time is now past when agents can afford to continue to wait for an improvement. The improvement must be provided without delay. Expenses are sky-rocketing: to operate an agency with the local and long distance telephone costs, postage, rents, taxes, travel, entertainment and secretarial, bookkeeping, legal and other fees have now made

it imperative that help be given to enable reputable agents to survive. Those trying to cover regional and stock theatres have complained especially, but all, without exception, are feeling the pressure. Many of those still active feel they must soon discontinue operation in the legitimate theatre unless we can all stand together to find a way for such operations to be practical and profitable.

For this reason we urgently request a meeting between the executives of Actors Equity Association and representatives of TARA to consider adjustment of RULE A along lines like the following:

a) In the recent talks between representatives of Equity, the League of New York Theatres and TARA, Equity and the League agreed to reaffirm to their members that only franchised agents may negotiate employment deals for Equity performers. This is

indeed already provided for in RULE A, but the clause has been regularly overlooked, neglected and, in practice, disregarded by producers and managers. The franchise (RULE A) is theoretically a mutually obligatory agreement. Without real adherence by the League and Equity to that provision, the more profitable engagements, of stars and lead players, are siphoned off from franchised agents by innumerable "business managers", "attorneys", "personal managers", and "accountants". These are not franchised nor controlled in any way by Equity. If they negotiate for performers -- and they do -- the commission revenue is lost to franchised agents.

b) As in all other fields served by agents, we should be paid a straight ten percent commission from the first dollar on all non-chorus engagements, including those under $1,000.00 per week. (Perhaps

salaries over $1,000.00 per week should be commissionable at a higher rate, on a sliding scale. As it is, the commissions from higher paid performers enable agents to stay in business, and service the lower paid ones as well. Perhaps this fact should be recognized and regularized.)

c) Commissions should be payable to agents on all salaries earned by Actors, (except for chorus and for rehearsal minimum) from the first day of the engagement to the last. This should include LORT engagements, where actors earn the same salary for rehearsal as for performance, usually for a longer period than the actual performance period. This would eliminate the "ten-week cut off".

d) The greatly expanded field of Off-Broadway should be commissionable, since Actors often want the services of agents, and agency operation costs are no lower

there than on Broadway ... sometimes higher. No agent can service Off-Broadway profitably under present rules. As a matter of fact, no agent can even hope to break even when servicing Off-Broadway.

e) When a negotiated salary includes "expenses", (often spelled out that way for the benefit of and at the request of the Actor) such "expenses" should be commissionable as salary. This principle also includes the recent provisions you negotiated for out-of-town production contracts. (Equity unilaterally"declared" these non-commissionable this season without notice to, or discussion with, the agents.)

f) Agents should be allowed to be reimbursed by clients for unusual expenses, such as long distance phone calls, cabs, xeroxing of scripts, and trips, incurred at the request of the client. We genuine-

ly believe that most of the members of Equity simply do not comprehend what it costs to run an average office week after week, and what is involved in a quick trip to Boston, Philadelphia, Washington, or in half a dozen long distance phone calls to straighten out some minor contractual matter, where no further improvement in terms is involved. We would like it clearly understood that we are not referring here to the decision made by the agent that it is in the best interest of the client and the deal to make a long distance phone call, to send a cable, or to make a trip out of town, but are referring only to those instances where the client requests maybe a second or a third out of town visit, where it is already impossible for him to pay for the agent's time, but should be possible for the client to pay for the agent's expenses. Attorneys charge for every min-

ute they spend counselling a client on the telephone, sending a letter, making a trip. They charge for all "unusual" expenses. Agents are perfectly prepared to bear this burden, as they have done historically, but it must be their decision when to shoulder this burden and in what manner and to what extent. When the client demands additional service, for which he cannot pay, he should at least attempt to pay the expenses.

g) Equity should help agents enforce the prompt collection of properly earned commission. In this regard, the standard production contract should have provisions for the inclusion of the negotiating agents' name, (as is done with Stock and LORT contracts). That would at least formalize the Actor's acknowledgment of the Agent's service, and eliminate the "Special Management" contract. Once

again: The franchise is a mutually obligatory agreement, and should be enforced by the Union for both its members and the Agents.

h) Both the League of New York Theatres and TARA seem to want a rule whereby the Union will honor the exchange of wires and/or letters confirming a deal, rather than insisting on the final contract as the only valid agreement. This modification could help protect the actors as well as the managements. It should be re-examined together.

We suggest a date be set within the next three or four weeks, to start discussions of these points. They are not peremptory demands. Far from it. They are an urgent appeal to fairness and business commonsense to enable those who serve your members to give good service, to function in a successful and orderly manner and to fulfill all

of the obligations that are inherent not only in the letter of agreements or franchises but in the spirit of the relationship between your members and your franchised agents.

Copies of this letter are going to all Equity franchised agents whether TARA members or not. TARA has approved it.

Please let us hear from you soon, so that a mutually convenient appointment can be arranged. We all have the same interests at heart, even though from different angles, and we all know that the need is real and extremely urgent.

Very sincerely yours,

THEATRICAL ARTISTS REPRESENTATIVES ASSOCIATION, INC.

/s/ Robert Lantz

Robert Lantz, President

PETITIONERS'S EXHIBIT
NO. 5 IN THE DISTRICT COURT

MINUTES OF THE COUNCIL
MEETING OF NOVEMBER 25, 1975

* * *

It was believed agents should be put on notice that Equity is aware of abuses.

Instances were cited where an actor who is not signed to an agent, is told that he would be submitted by an agent for a specific job. That actor then does not allow any other agent to submit him, and therefore runs the risk of being left out. Further, an agent who says he will submit a member is eliminating that member from the competition because he is really going to sumit[sic] a client of his. It was believed to be AEA's responsibility to police and service its members in this area regardless of the time and money involved.

* * *

PETITIONERS' EXHIBIT NO. 67
IN THE DISTRICT COURT

[National Association Of Talent Representatives, Inc. Letterhead Omitted In Printing]

31 August, 1977

Mr. Don Grody
Actors' Equity Association
1500 Broadway
New York, N.Y. 10036

Dear Mr. Grody:

The following members of National Association of Talent Representatives, Inc. (NATR) who have also been members of Theatrical Artists Representatives Association, Inc. (TARA) have resigned from TARA because they cannot in good conscience accept the terms and proposals being negotiated by Equity and TARA.

H.A. Artists & Assoc.
Bret Adams, Ltd.
Richard Astor
J. Michael Bloom
D.M.I. Talent Assoc.
Marje Fields
Henderson/Hogan Agency
Jacobson/Wilder
Kahn, Shuman Assoc. Inc.
Oppenheim-Christie
Joel Pitt Agency
Raglyn-Shamsky
Wm. Schuller Agency
Mort Schwartz
Stewart Artists Corp.
Talent Reps.
Jean Thomas
Michael Thomas

Gary Leaverton
Lester Lewis Assoc.
Inc.

TRH Inc.
Bob Waters Agency
Ann Wright

Please be advised that these agents who represent a large number of your members shall henceforth be represented by NATR (already recognized by your sister unions SAG and AFTRA as representing New York Agents) in any future negotiations with Equity.

We are enclosing a statement which clearly sets forth NATR's position on the issues presently dividing us.

Very truly yours,

Ruth L. Lehner
President

cc: Equity Officers
Equity Council

PETITIONERS' EXHIBIT
NO. 71 IN THE DISTRICT COURT

[Actors' Equity Association

Letterhead Omitted In Printing]

* * *

October 11, 1977

Mr. Howard Hausman
Theatrical Artists'
Representatives Association
The William Morris Agency
1350 Avenue of the Americas
New York, New York 10019

Dear Howard:

In addition to the Memorandum of September 12, 1977 (additional copy enclosed) which forms the basis for our final understanding, I will here set forth those ad-

ditional understandings we have reached in the last few weeks, in order to find a resolution to our dispute, and which were approved by the Actors' Equity Association Council at its last meeting of September 27, 1977.

1. It is understood that if, in future, we agree with an agent or group of agents on terms which are more favorable than contained in our understanding with TARA, we will make such more favorable terms available to your members in the same manner as provided to the agent or group of agents.

2. We acknowledge and reinforce our understanding, as described in the September 12 memorandum, that neither party "will unilaterally impose any practice or requirement on the other without prior

agreement." Nevertheless, this understanding does permit, as described in the paragraph immediately preceding it, that the Advisory Committee on Chorus Affairs shall be the final arbiter in determining whether, after conversion from Principal to Chorus contract, an agency commission may continue to be paid.

3. In accordance with my commitment, we here set forth the rules governing run-of-the-play contracts. A R-O-P contract can be executed only on the form provided by Equity in accordance with its agreement with the League of New York Theatres and Producers Inc. A copy of the form is attached. The deletions and amendments appearing on the form are in the process of being printed as part of the new form agreed to by the League and Equity. A R-O-P contract is usually executed for a

fixed period of a year or less. However, the compensation must be at least $75 above the standard minimum. If an agent secures the execution of a R-O-P contract for an Equity member, the agent may collect a 10% commission for the duration of the engagement. A R-O-P contract may also be executed for in excess of a year. This is not an infrequent arrangement for stars. In such instances, the Producer is required to post additional bond in order to assure payment of the required periods of guarantee. See Production Rule 19G. In the event of a breach by the employer of a R-O-P contract, the Actor is entitled to continue to receive his contractual salary and, of course, the agent his commission. As a matter of policy, Equity will not accept contracts for a fixed period of more than four weeks unless the R-O-P premium is included in the actor's

compensation. Finally, it should be stressed that whether or not a R-O-P contract is signed, if the agent has succeeded in negotiating a contract which is at least 20% above the minimum, he is entitled to a 10% commission for as long as the actor may be employed in the play.

4. TRANSITION PERIOD. For contracts which were executed prior to July 15, 1977 and subsequent to May 1, 1977, Equity agrees that the Agency Regulations in force on May 1 will govern the payment of commissions. Thus, if a contract had been executed on July 10 calling for a salary of $325 per week, the agent would be entitled to a commission of $32.50 per week for ten weeks. This would be so because the negotiated salary was only $40 above the then minimum ($285), and therefore less than the 20% required to collect

commissions for the duration of the engagement. Note, too, that the weekly payment of $32.50 does not reduce compensation below $285, the only guide for reckoning the minimum Production salary at that time. The fact that the actor's effective salary would be $355, because of the successful AEA negotiations would have no effect on the payment of commissions. If, on the same date, due to an agent's actions, the actor executed a contract for $350, which is more than 20% above $285, the agent would be entitled to collect a commission of $35 per week for the duration of the actor's engagement. Of course, not being on a Run-of-the-Play contract, the actor would be able to terminate within two weeks. The final example would be where a Run-of-the-Play contract is executed on July 10 which, at the minimum, would call for a salary of $335 per

week ($285 plus $50 premium for Run-of-the-Play). Under such an arrangement the agent collects $33.50 per week for the duration of the engagement. The actor's effective salary, however, would be $430 ($355 minimum plus $75 premium for Run-of-the-Play). It need be stressed that the Council's acceptance of this arrangement carries with it the proviso that no such accommodation can be granted in the future. Thus, if an agent wishes to assure that he will not lose commission because of increases in the Equity minimums, he must negotiate into the employment contract a provision which raises his client's salary by at least as much as would be required to keep the actor's salary 20% above the new minimum of 10% is to be collected for the duration of the agreement. Where an actor's salary is close to what will be the new minimum in

1979 ($400), unless the agent includes a provision which, proportionately or by a fixed sum, raises his client's salary on the anniversary date of the contract, he may lose or have diminished his commission to the extent that it might invade the Equity minimum.

These are the four items which we have previously discussed and which the Council has expresly approved. I might add that I informed the Council on October 4 when these matters were discussed that the TARA representatives would recommend adoption by TARA members at its meeting to be held this week.

In order to be sure that nothing is allowed to fall between the cracks, I am enclosing a copy of my April 18, 1977 letter to franchised agents. It is accurate ex-

cept insofar as the memorandum of September 12 or anything else contained herein may have modified it. I am also enclosing the Agency Authorization and Exclusive Management Contract, the only two forms we are now accepting from franchised agents. These forms have been in use for several months now and appear to be practical. I know you have expressed some reservations about paragraph 6(b) of the Exclusive Management Contract indicating that the paragraph may suffer from imprecision. While I cannot share your concern, I agreed that we would be amenable to amendments which would clarify the intent of paragraph 6(b). It is certainly not our purpose to permit either agents or actors to use strategems to avoid the mutual responsibilities of that section.

With TARA's approval of all the foregoing, I would hope that we may promptly

reduce to written form a provision of the Agency Regulations which will be mroe understandable than the late Rule A. When we complete that task we will promptly transmit the Regulations to you for your comments, since it is our intention to solicity your assistance in making the new Agency Regulations workable. I do not foresee any serious problems in the area of language since I believe we will have agreed on all the principles involved in this controversy.

Sincerely,

Donald Grody
Executive Secretary
/s/Don
DG/ra
encs.
cc: Jerome B. Lurie, Esq.
Harriet Slaughter

[Actors' Equity Association Letterhead Omitted In Printing]

* * *

Sept. 12, 1977

MEMORANDUM

Subject: THE STATUS OF DISCUSSIONS BETWEEN EQUITY AND TARA

BACKGROUND AND EXPLANATION OF NEW PROVISIONS IN AGENCY RULES AND REGULATIONS

Effective May 1, 1977 specific changes were made in the Rules and Reg-

ulations Governing Agents (formerly known as Rule A).

Commissions: The maximum commission payable to an agent shall be 10% (5% for Off-Broadway) of the salary paid the actor under his Equity individual employment agreement. Such commission shall be payable for a period of 10 weeks only, unless the agent shall have negotiated a salary which is at least 20% above the minimum salary required to be paid under the Equity applicable rules.

If the actor's salary is at least 20% above the required minimum, then the commission shall be payable for the length of actor's engagement, except that the period under a LORT Contract shall not be for longer than 6 months. (Note: LORT rehearsal salary must be the same as contractual salary.)

A 10% commission shall be permitted under the Off-Broadway Contract only if the commissionable salary is in excess of the Production Contract minimum.

On August 2, 1977 the Council of Actors' Equity Association resolved to include in the new Agency Rules and Regulations that 10% commission shall be payable for the life of the contract on run-of-play contracts, not to invade the established minimum.

BROADWAY		OFF-BROADWAY	
$355.00	Minimum	$175.00	Minimum Payment of Broadway minimum in order to sign run-of-play
75.00	Premium		
$430.00	- $43.00 commission for life of contract	$355.00	- $35.50 commission for life of contract

NOTE: There are only three run-of-play contracts: Broadway, which has $75.00 a week premimum, Off-Broadway, which carries the Broadway minimum as the premium and Dinner Theatre with $100.00 premium.

Run-of-play which carries a premium should not be confused with length of engagement i.e.: Stock productions may run no longer than 8 week at any one theatre without the express permission of Equity. LORT Contracts have the option of an "open end run or a specific length of engagement." Dinner Theatre Contracts may carry "tour riders" for performance at several locations.

RECENTLY NEGOTIATED CONTRACTS

Three Equity contracts now provide for the producer to pay commissions, CORST, COST and Special Production. While there is no specific language in the employment contract which places a limitation on the time a commission must be paid, there were discussions at the negotiating table in regard to a 10 week period. Equity cannot now change the intent of those negotiations and impose a new set of regulations for producers when the new Agency Regulations specifically state 10% commission for 10 weeks, except where 20% over minimum is negotiated or in the case of run-of-play contracts. The language in each of the contracts is set forth below:

CORST: When a contract is negotiated by an Agent and said Agent is the Agent of record on the face of the contract, any commission payable which would invade minimum salary must be paid by the Producer.*

CORST: X Company Minimum $250.00
*$25.00 for 10 weeks

Y Company Minimum $199.00
*$19.90 for 10 weeks

Z Company Minimum $180.00
*$18.00 for 10 weeks

COST: When a contract is negotiated by an Agent and said Agent is the Agent of record on the face of the contract, the Actor shall be reimbursed for commissions paid to such

Agency on account of invasion of minimum salary to the extent of five (5%) percent of the minimum. The intention of this rule is solely to prevent the invasion of the minimum salary and it shall not be construed to imply that the Producer is accepting the obligation to pay commissions to Agents on behalf of Actors.*

COST: Minimum $241.00 *$12.05 for 10 weeks

SPECIAL PRODUCTION: When a contract is negotiated by an Agent and said Agent is the Agent of record on the face of the contract, any commission payable which would invade minimum salary must be paid by the Producer."

SPECIAL PRODUCTION: Minimum $205.00

*$20.50 for 10 weeks

MODIFICATIONS OF AGENCY REGULATIONS APPROVED BY COUNCIL AUGUST 2, 1977

1) When a rehearsal salary is negotiated by the agent that is in excess of the Equity minimum, it shall be commissionable as per commission rates established, 10% not to invade the minimum. The Council further resolved that the new Agency Rules be in effect for a 5 year period.

2) A notice requesting discussion of change may be given by TARA or Equity after 4 years. Six months after first notice, if TARA or Equity is not satisified with discussion, two years notice of termination of the Agency Rule and Ex-

clusive Management and Agency Authorization Contracts may be given by either side.

3) At the same Council meeting the Council rejected the Agency Committee's recommendation to send a referendum to the Equity membership to vote that either 1) all agents be required to hold Open Interview Hours and that 5% commission for 10 weeks would permit invasion of minimum or, 2) that there be no invasion of minimum and no agent shall be required to have Open Interview hours for AEA members.

NOTE: (Were such a referendum to be sent out Equity could not distinguish between Chorus and non-Chorus since they are not separately identified on membership rosters. Since the absorption of Chorus

Equity into AEA in 1955, there are no Chorus Equity members. Any member of Equity from time to time may perform under a Chorus Contract.)

FRAMEWORK FOR REVIEWING PRINCIPAL CONTRACTS CONVERTED TO CHORUS

The Advisory Committee for Chorus Affairs has agreed to put into effect on a trial basis for one year that ACCA consider on an individual basis for final determination as to whether an agent will be allowed to collect applicable commissions from an individual Equity member in orginally conceived productions under the Production Contract which contract has been converted from PRINCIPAL to CHORUS. This procedure will be re-examined after the period of one year.

OTHER AREAS OF AGREEMENT BETWEEN EQUITY AND TARA

1) Equity has agreed that neither TARA or Equity will unilaterally impose any practice or requirement on the other without prior agreement.

2) The emergency contract procedure has been agreed between the two parties.

3) Commission Disputes Collections: Equity has agreed to use its internal disciplinary powers to aid in the collection of commissions which are clearly, in the view of Equity, due to the agent or to which the agent is entitled by an arbitration award.

4) Termination of Agency Contracts: a) If during any ninety (90) days period the Agent fails to secure for the Actor a bona fide offer of employment from an employer commensurate with the Actor's prestige for at least four weeks at the Actor's customary salary, which offer is communicated by the Agent to the Actor in reasonable detail and in writing, then in such case the Actor shall have the right to terminate this agreement by notice in writing to the Agent and to Equity.

b) The ninety (90) day period described above shall be extended during any period when (i) the Actor has notified the Agent in writing of his unavailability; (ii) the Actor is employed and is therefore unavailable; and (iii) the Actor is unable to respond to a call for his ser-

vices by reason of mental or physical incapacity.

c) No termination under this paragraph shall deprive the Agent of the right to receive commissions on monies earned or received by the Actor prior to the date of termination or earned or received by the Actor after the date of termination of the Agent's agreement on contracts for the Actor's services entered into by the Actor prior to the effective date of any such termination.

5) Termination For Other Reasons: The Actor and Agent may agree that one or more persons individually named on the face of the Exclusive Managerment Contract shall represent the Actor and in the event such person or persons listed on the contract discontinues his relationship

with the Agency, the Actor then has the right to terminate that agreement.

A careful evaluation of the name or names to be placed on the face of the contract should be considered, there being no requirement that any name be inserted.

6) Franchise Fees: The new franchise fee for new agents $200.00 and an annual renewal fee of $60.00 for franchised agents and $40.00 a year for subagents.

UNRESOLVED MATTERS

Two outstanding items to be resolved between the parties are 1) Open Interview Hours for New York agents who obtained their franchises prior to 1969. Both parties have agreed that a continuing con-

versation and exchange of thoughts and modification of the Open Interview Hours should be the first order of business in terms of arriving at a principle whereby actors have accessibility to all agents without placing an unfair burden on the time of agents. 2) TARA has submitted that a few TARA members are seeking a transitional rule to protect agent's commission in those instances where the Equity-bargained increase in minimums would vitiate the agent's right to collect commission under the new Agency Rules. Equity has requested that a survey be made to determine the number of instances where agents have lost commissions due to the increase in minimums in the Production Contract. Equity had indicated its willingness to be responsive to the agents if specific numbers and

cases are drawn up by TARA for Equity's consideration.

Equity has pointed out, however, that it will have great difficulty treating generally with this item since Agents currently operating under Equity's regulations have been faced with similar dilemmas and Equity must not treat one group of agents differently than another group which has been operating under the rules as they now exist.

[Actors' Equity Association
Letterhead Omitted In
Printing]

* * *

April 18, 1977

Dear Equity Franchised Agent:

We have important news to announce to you concerning amendments to Equity's Agency Regulations which will, we believe, protect our members more fully and at the same time make equitable adjustments in the commissions you may legitimately expect from our members.

By its action of April 12, 1977, the Council of Actors' Equity Association approved the following commission rates:

1. Commissions shall be 10% of gross salary, including every form of compensation the actor may receive under his Equity Individual Employment Contract, collectible for a period of 10 weeks; provided, however, that such 10% commission may not invade the minimum scale negotiated for our members under any contract.

2. Commissions for Off Broadway shall be 5% of gross salary, including every form of compensation the actor may receive under his Equity Individual Employment Contract, collectible for a period of 10 weeks; provided, however, that such 5% commission may not invade the minimum scale negotiated under the Off Broadway contract. If a salary is

negotiated in excess of the Production Contract minimum, then a 10% commission may be required, provided that the Production minimum is not invaded.

3. In the event the agent can negotiate compensation at least 20% over scale in the specific contract, the appropriate commission may be collectible for the period of the actor's employment under that contract, except in LORT, where the period shall not exceed six months.

4. Equity-negotiated out-of-town expense money is not commissionable in any way.

5. No commissions shall be permitted under the COLT, HAT/BAT,

Theatre for Young Audiences or Mini Contracts.

6. No commissions shall be permitted under chorus contracts.

7. Commissions are not permissable during the rehearsal period except under the Industrial Shows Contract.

Please be reminded that these decisions were reached after a national referendum of our members and after prolonged debate among the membership, at membership meetings and within the Council. We should like to put the new commission rates into effect as soon as possible. However, it is necessary that our members be advised. This information will be contained in a special mailing to our members which should be in their hands by April 25.

Therefore, the effective date of the new commission schedule will be May 1, 1977. Individual Equity employment contracts entered into on and after that date will be subject to the new rates.

In addition, there are certain obligations which will be binding upon each and every franchised agent, such as:

1. The requirement that interviews be held with our members for a total of at least two hours each and every week.

2. The right of Equity to revoke a franchise for cause. These will be internal union proceedings, with a final decision to be rendered by the Council and subject to binding arbitration, if required.

3. There will be a Disputes Settlement Procedure Under the aegis of Equity's Agency Committee.

4. There will also be a procedure for the settlement of disputes on failure to pay commissions. If the Agency Committee or the Council are unable to resolve the matter, then it may be submitted to impartial and binding arbitration.

5. In order to terminate an agreement with an agent for the agent's failure to offer suitable employment, the actor must show that in the preceding 90 day period the actor has not been offered employment in the legitimate theatre at his usual salary for a minimum of four weeks. Naturally the unavailability of the

actor has the effect of staying the 90 day period.

Other miscellaneous provisions of the new Agency Regulations will:

1. Formally require the use of Equity's "Emergency Contract Procedure in situations where it is impossible to execute a standard Equity employment contract.

2. Agency franchise fees will be increased to $60 per agent, $40 for each sub-agent. A new agents' franchise will cost $200. Naturally, agents who have already paid their fees will not be required to pay anything additional this year.

3. There will be arrangements made for the merger and consolidation of agencies and also for the right of Equity members to withdraw from their agency agreements if the effect of the merger or consolidation will leave the member in a disadvantageous position or where he will no loner be represented by the agent he had originally bargained for. Naturally, this is a complicated provision and we will attempt as soon as possible to set it down with precision and clarity.

4. Agencies will be required every six months to provide an updated list of its clients to Equity, the content of which will be made available to all Equity members.

5. Equity will strictly enforce the requirement that only franchised agents, and no others, shall be allowed to negotiate contracts for Equity members.

6. There will be a provision which will make clear that if a franchised agent surrenders his franchise or has his franchise revoked, all existing agency agreements with Equity members will be null and void forthwith.

Obviously, there are some provisions stated which will not be entirely clear to everyone. They will require careful drafting and efforts will be made to make the language as clear as possible. To that end, Equity has immediately undertaken the entire revision of what has for-

merly been known as Rule A. We will hope to have the new Agency Regulations in your hands and available to our members as soon as possible, and we ask your forbearance in the meantime.

We ask your cooperation in the meantime and wish to thank you for your patience during these difficult times. We hope your relationship with Equity and our members will be long and prosperous. We promise you that your just grievances will be dealt with promptly and we will seek your cooperation in enacting legislation at the State levels which will both protect your interests and safeguard our members from the nefarious practices of a few.

Most sincerely yours,

/s/Donald Grody

Donald Grody

Executive Secretary

DG/ra

* * *

PETITIONERS' EXHIBIT
NO. 72 IN THE DISTRICT COURT

[Theatrical Artists Representatives Association, Inc. Omitted In Printing]

October 13, 1977

Mr. Donald Grody
ACTORS' EQUITY ASSOCIATION
1500 Broadway
New York, N.Y.

Dear Don:

This is to inform you that Theatrical Artists Representatives Association, Inc., at its membership meeting on October 12, 1977, has agreed to the terms for modifying RULE A as laid out in your letter of October 11, and your previous memorandum of September 12, 1977.

We understand that the text of the modification of RULE A will be worked out

mutually, and such matters as the substance of Paragraph 6 of the Exclusive Management contract, and the overall form of the Exclusive Management contracts, and the Agency Authorization for a specific Engagement, which you attached to your letters, will be modified mutually.

We shall now tell those of the TARA members who accept TARA's recommendation, and wish to be franchised, to proceed with the re-signing of Equity members, and we both agree such re-signings will be deemed as ordinary and timely renewals.

To expedite technical arrangements, you will send me a simple, brief form letter, under which all TARA members previously franchised who wish to do so, will subscribe now to the new arrangement, subject to the working out of detailed language in the near future. If you form

for such a letter reaches me Monday, we will immediately send such letter to TARA's members, to sign and return individually to Equity.

With respect to all such signatories, it is our understanding that no reprisals will be taken either way between the agents involved and Equity for anything occurring between January 6 and October 15, 1977.

Yours very truly,

THEATRICAL ARTISTS
REPRESENTATIVES
ASSOCIATION, INC.

/S/ Howard Hausman

By: Howard Hausman,
Secretary

cc: ROBERT LANTZ, President

RESPONDENTS' EXHIBIT
K-1 IN THE DISTRICT COURT

[Actors' Equity Association

Letterhead Omitted In Printing]

* * *

EXCLUSIVE MANAGEMENT CONTRACT

UNDER EQUITY AGENCY REGULATIONS

THIS AGREEMENT, made and entered into between....., an Equity Franchised Agent ("Agent") and ....., an Equity Member ("Actor") in accordance with the Equity Rules and Regulations ("Regulations").

1. The Agent shall be the Actor's sole and exclusive agent in the legitimate theatre industry. This contract is limited to the legitimate theatre in-

dustry and to contracts of the Actor as an actor in said industry. The Actor warrants he has the right to sign this agreement and has no other agreement in effect which is in conflict herewith. The Agent and the Actor are both bound by the provisions of the Regulations which govern the relations of the members of Actors' Equity Association as actors with agents. Said Regulations, as they exist and as they may be amended by Equity from time to time, are hereby incorporated herein by reference, as if fully set forth and made a part of this agreement.

2. The term of this contract shall be for a period of .... (not in excess of 5 years) commencing ....., 19.... . The initial contract between

Actor and Agent shall not be for more than one year.

3. (a) COMMISSIONS. The maximum commission payable to the Agent shall be 10% (5% for Off Broadway and Special Production) of the salary paid the Actor under his Equity individual Employment Agreement. Such commission shall be payable for a period of ten weeks only, unless the Agent shall have negotiated a salary which is at least 20% above the minimum salary required to be paid under the applicable Equity collective bargaining agreement. If the Actor's salary is at least 20% above the required minimum, then the commission shall be payable for the length of the Actor's engagement, except that the period under a LORT contract shall not be for longer than six months. A 10% commission shall be permitted under

the Off Broadway Contract, and Special Production Contract only if the commissionable salary is in excess of the Production Contract minimum and complies in all other respects with this paragraph.

(b) NO INVASION OF SCALE. The collection of a commission shall in no circumstance be allowed to reduce the Actor's compensation below the Equity negotiated minimum salary.

(c) NO COMMISSION ON OUT-OF-TOWN EXPENSES. Under no circumstances shall a commission be collected upon out-of-town expenses required to be paid under an Equity collective bargaining agreement.

(d) NO COMMISSION PERMITTED. Commission shall not be allowed under any of the following Equity contracts:

Theatre for Young Audiences (Children's Theatre), Hollywood Area Theatre and Bay Area Theatre (HAT/BAT), Chicago Off-Loop Theatre (COLT), Mini-Contract, and all casual contracts, provided however that the payment of commission shall be permitted in all but Children's Theatre if the commissionable salary is in excess of the Production Contract minimum and complies in all other respects with this paragraph.

(e) NO COMMISSION ON CHORUS CONTRACTS. Commission shall not be allowed under any Chorous Contract of Employment.

(f) NO COMMISSION ON REHEARSAL SALARY. Commission shall not be followed for the rehearsal period except under the Industrial Shows Contract.

(g) RESPONSIBILITY FOR PAYMENT. Commissions shall be payable when and as monies or other considerations are received by the Actor or by anyone else for or on the Actor's behalf. Such commissions shall be payable by the Actor to the Agent, as aforesaid, during the term of the contract and thereafter only as specifically provided herein or in the Regulations.

4. Should the Agent negotiate a contract of employment for the Actor and secure for the Actor a bona fide offer of employment, which offer is communicated by the Agent to the Actor in reasonable detail and in writing, which offer the Actor declines, and if, after the expiration of the term of this agreement and within 60 days after the date upon which the Agent gives such written information

to the Actor, the Actor accepts said offer of employment on substantially the same terms, then the Actor shall be required to pay commissions to the Agent upon such contract of employment. If an agent employed under a prior agency contract is entitled to collect commissions under the foregoing circumstances, the Agent with whom this contract is executed waives his commissions to the extent that the prior agent is entitled to collect the same.

5. TERMINATION OF AGENT'S SERVICES. The Actor may, at any time, by notice in writing to the Agent and to Equity, instruct the Agent that he is prohibited from rendering further services to the Actor and from holding himself out as the Actor's agent. This shall not affect the right of the Agent to collect commissions during the term of this agreement.

6. TERMINATION OF AGREEMENT.

(a) If during any ninety (90) day period the Agent fails to secure for the Actor a bona fide offer of employment from an employer commensurate with the Actor's prestige for at least four weeks at the Actor's customary salary, which offer is communicated by the Agent to the Actor in reasonable detail and in writing, then in such case the Actor shall have the right to terminate this agreement by notice in writing to the Agent and to Equity.

(b) The ninety (90) day period described above shall be extended during any period when (i) the Actor has notified the Agent in writing of his unavailability; (ii) the Actor is employed and is therefore unavailable; and (iii) the Actor is unable to respond to a call for

his services by reason of mental or physical incapacity.

7. RELIANCE UPON SPECIFIC REPRESENTATION

If agent agrees in writing that Actor shall be entitled to the specific services of any agent or agents named below, as a condition of this agreement, Actor may terminate if such agent or agents cease to be available to render such services. This paragraph applies only if initialed below by Agent:

....

....

8. Any controversy under this contract, or under any contract executed in renewal or extension hereof or in substitution herefor or alleged to have been so executed, or any controvesy as to the existence, execution or validity hereof or thereof, or the right of either party to void this or any such contract or alleged contract on any grounds, or the construction, performance, non-performance, operation, breach, continuance or termination of this or any such contract, shall be determined in accordance with the Regulations.

9. The Agent agrees, convenants, represents and warrants as follows:

(a) to be available at all reasonable times for consultation with the Actor in the city or cities named herein

during reasonable hours, subject to absence of the person or persons from the office occasioned by business activities outside the office, and subject further to reasonable absences due to illness or reasonable vacation periods.

(b) to maintain an office and telephone open during all reasonable business hours (emergencies such as sudden illness or death excepted) within the city (cities) of ...., or its environs, throughout the term of this agreement and that some representative of the Agent will be present at such office during business hours.

(c) to counsel and advise the Actor in matters which concern the Actor's professional interest in the legitimate theatre industry.

(d) to be truthful in his statements to the Actor.

(e) not to conceal facts from the Actor, in the performance of this contract, which are pertinent and which the Actor is entitled to know.

(f) to use all reasonable efforts to assist the Actor in procuring employment for the services of the Actor in the legitimate theatre industry.

(g) to maintain the relationship of a fiduciary to the Actor. When instructed by the Actor not to give out information with reference to the Actor's affairs, the Agent will not disclose such information.

(h) not to engage in dishonest or fraudulent practices in making or entering into this contract or the performance thereof.

(i) to consider only the interest of the Actor in any dealings for the Actor pursuant to this contract, and never to consider or act in the interest of the Agent or any producer when such interests are opposed to the interests of the Actor.

(j) to make no binding engagement or other commitments on behalf of the Actor without the approval of the Actor and without first informing the Actor of the terms and conditions of such engagement or commitment.

(k) to be equipped and to continue to be equipped to represent the Actor ably and diligently in the legitimate theatre industry throughout the terms of this contract, and to so represent the Actor. The Agent's duties shall include the full representation of the Actor in his career in the legitimate theatre industry and are not limited to securing employment.

(l) as to the payment of compensation the Agent shall be obligated to serve the Actor and perform obligations as required herein with respect to any employment contract or to any employment requiring the services of the Actor on which such compensation is based.

10. The Agent may represent actors of the same general qualifications and elig-

ible to perform the same parts or roles, and such representation shall not constitute a violation of the Agent's obligations hereunder. The Agent agrees that prior to the execution of this contract, if the Actor so requires, the Agent will deliver to the Actor a list of the actors of the same qualifications and eligible for the same parts or roles represented by the Agent.

11. Any situation or circumstance not expressly covered in this agreement or in the Regultions shall be subject to final determination by Equity.

12. FOR CALIFORNIA ONLY.

This provision is inserted in this contract, pursuant to regulations of ACTORS' EQUITY ASSOCIATION, a bona fide

labor union, which regulations govern the relations of its members to employment agencies and artists' managers. Reasonable written notice shall be given to the Labor Commissioner of the State of California of the time and place of any arbitration hearing hereunder. The Labor Commissioner of the State of California or his authorized representative, has the right to attend all arbitration hearings. The clause relating to the Labor Commissioner of the State of California shall not be applicable to cases not falling under the provisions of Section 1700.45 of the Labor Code of the State of California.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the ..... day of ....., 19...,

NOTE: *In order to be valid, the Actor must receive a copy. No commission shall be paid unless a copy is on file with Equity. One copy to be given to Actor.

..... ACTOR

**Copy to be filed by Agent with Equity immediately after execution.

..... AGENT

THIS ARTISTS' MANAGER IS LICENSED BY THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA. This artists' manager is franchised by the Actors' Equity Association. This form of contract has been approved by the Labor Commissioner of the State of California on November 21, 1977.

RESPONDENTS' EXHIBIT K-2
IN THE DISTRICT COURT

[Actors' Equity Association Letterhead Omitted In Printing]

* * *

AGENCY AUTHORIZATION FOR A SPECIFIC ENGAGEMENT UNDER EQUITY AGENCY REGULATIONS

THIS AGREEMENT, made and entered into between..... an Equity Franchised Agent ("Agent") and....., an Equity Member ("Actor") in accordance with the Equity Agency Regulations ("Regulations").

1. The Agent shall be the Actor's sole and exclusive agent to negotiate for and on behalf of the Actor with the Producer hereinafter named for the rendition of Actor's services as an actor in the play or plays hereinafter named. The Actor

warrants he has the right to sign this agreement and has no other agreement in effect which is in conflict herewith. The Agent and the Actor are both bound by the provisions of the Regulations, which govern the relations of members of Actors' Equity Association as actors with agents. Said Regulations, as they exist and as they may be amended from time to time, are hereby incorporated herein by reference, as if fully set forth and made a part of this agreement.

2. (a) Name of play (or plays) or theatre.....

.....

(b) Name of the producer.....

3. (a) COMMISSIONS. The maximum commission payable to the Agent shall be 10% (5% for Off Broadway and Special Production) of the salary paid the Actor

under his Equity Individual Employment Agreement. Unless the salary is at least 20% above the minimum salary required to be paid under the applicable Equity collective bargaining agreement or a Run-of-the-Play contract has been executed, such commission shall be payable for a period of ten weeks only. If the Actor's salary is at least 20% above the required minimum, or if he is under a Run-of-the-Play contract, then the commission shall be payable for the length of the Actor's engagement, except that the period under a LORT contract shall not be for longer than six months. A 10% commission for the duration of the engagement shall be permitted under the Off Broadway Contract, and Special Production Contract only if the commissionable salary is in excess of the Production Contract minimum. Commission shall not be allowed

for the rehearsal period except under the Industrial Shows Contract or where the rehearsal salary exceeds the applicable Equity minimum.

(b) NON COMMISSIONABLE. Commission shall not reduce the Actor's pay below the applicable minimum, nor apply to the collectively bargained out of town expenses, nor be allowed under any of the following Equity contracts: Theatre for Young Audiences (Children's Theatre), Hollywood Area Theatre and the Bay Area Theatre (HAT/BAT), Chicago Off-Loop Theatre (COLT), Mini Contracts, and all casual contracts, provided however that the payment of commission shall be permitted in all but Children's Theatre if the commissionable salary is in excess of the Production Contract minimum. Commission shall not be allowed under any Chorus Contract.

(c) RESPONSIBILITY FOR PAYMENT. Commissions shall be payable when and as monies or other considerations are received by the Actor or anyone else for or on the Actor's behalf. Such commission shall be payable by the Actor to the Agent, as aforesaid, pursuant to this contract and thereafter only as specifically provided herein or in the Regulations. Commissions shall also be payable for any Equity employment contracts entered into during the term of this agency agreement and for the duration of such Equity contracts, as well any modifications, extensions or renewals or substitutions thereof except as otherwise specifically provided in the Regulations.

4. Should the Agent negotiate a contract of employment for the Actor and secure for the Actor a bona fide offer of employment, which offer is communicated

by the Agent to the Actor in reasonable detail and in writing, which offer the Actor declines, and if, after the expiration of the term of this agreement and within 60 days after the date upon which the Agent gives such written information to the Actor, the Actor accepts said offer of employment on substantially the same terms, then the Actor shall be required to pay commissions to the Agent upon such contract of employment. If an Agent employed under a piror agency contract is entitled to collect commissions under the foregoing circumstances, the Agent with whom this contract is executed waives his commissions to the extent that the prior agent is entitled to collect the same.

5. TERMINATION OF AGENT'S SERVICES. The Actor may, at any time, by notice in writing to the Agent and to Equity, instruct the Agent that he is prohibited

from rendering further services to the Actor and from holding himself out as the Actor's agent. Despite the foregoing, should the Actor obtain the employment covered by this agreement within six months of the date of execution of this agreement, he shall not be relieved of the obligation to pay the commissions provided for herein.

6. Any controversy under this contract, or under any contract executed in renewal or extension hereof or in substituion hereof or alleged to have been so executed, or any controversy as to the existence, execution or validity hereof or thereof, or the right of either party to void this or any such contract on any grounds, or the construction, performance, non-performance, operation, breach, continuance or termination of this or any such contract, shall be determined in accordance with the Regulations.

7. The Agent agrees, convenants, represents and warrants as follows:

(a) to be available at all reasonable times for consultation with the Actor in the city or cities named herein during reasonable hours, subject to absence of the person or persons from the office occasioned by business activities outside the office, and subject further to reasonable absences due to illness or reasonable vacation periods.

(b) to maintain an office and telephone open during all reasonable business hours (emergencies such as sudden illness or death excepted) within the city (cities) of..... or its environs, throughout the term of this agreement and that some representative of the Agent will be present at such office during business hours.

(c) to counsel and advise the Actor in matters which concern the Actor's professional interest in the legitimate theatre industry.

(d) to be truthful in his statements to the Actor.

(e) not to conceal facts from the Actor, in the performance of this contract, which are pertinent and which the Actor is entitled to know.

(f) to use all reasonable efforts to assist the Actor in procuring employment for the services of the Actor in the legitimate theatre industry.

(g) to mainteain the relationship of a fiduciary to the Actor. When instructed by the Actor not to give out information with reference to the Actor's affairs, the Agent will not disclose such information.

(h) not to engage in dishonest or fraudulent practices in making or entering into this contract or the performance thereof.

(i) to consider only the interest of the Actor in any dealings for the Actor pursuant to this contract, and never to consider or act in the interest of the Agent or any producer when such interests are opposed to the interests of the Actor.

(j) to make no binding engagement or other commitments on behalf of the Actor without the approval of the Actor and without first informing the Actor of the terms and conditions of such engagement or commitment.

(k) to be equipped and to continue to be equipped to represent the Actor ably and diligently in the legitimate theatre industry throughout the term of this contract and to so represent the Actor. The

Agent's duties shall include the full representation of the Actor in his career in the legitimate theatre industry and are not limited to securing employment.

1. as to the payment of compensation the Agent shall be obligated to serve the Actor and perform obligations as required herein with respect to any employment contract or to any employment requiring the services of the Actor on which such compensation is based.

8. The Agent may represent actors of the same general qualifications and eligible to perform the same parts or roles, and such representation shall not constitute a violation of the Agent's obligations hereunder. The Agent agrees that prior to the execution of this contract, if the Actor so requests, the Agent will deliver to the Actor a list of the actors of the same qualifications and eligible

for the same parts or roles represented by the Agent.

9. Any situation or circumstance not expressly covered in this agreement or in the Regulations shall be subject to final determination by Equity.

10. FOR CALIFORNIA ONLY.

This provision is inserted in this contract, pursuant to regulations of ACTORS' EQUITY ASSOCIATION, a bona fide labor union, which regulations govern the relations of its members to employment agencies and artists' managers. Reasonable written notice shall be given to the Labor Commissioner of the State of California of the time and place of any arbitration hearing hereunder. The Labor Commissioner of the State of California or his authorized representative, has the right to attend all arbitration hearings. The clauses relating to the Labor Commis

sioner of the State of California shall not be applicable to cases not falling under the provisions of Section 1700.45 of the Labor Code of the State of California.

IN WITNESS WHEREOF, the parties hereto have executed this agreement the ..... day of ...., 19.....,

NOTE: *In order to be valid, the Actor must receive a copy. No commission shall be paid unless a copy is on file with Equity. One copy to be given to Actor.

**Copy to be filed by agent with Equity immediately after execution.

.....

ACTOR

.....

AGENT

THIS ARTISTS' MANAGER IS LICENSED BY THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA. This artists' manager is franchised by the Actors' Equity Assocaiton. This form of contract has been approved by the Labor Commissioner of the State of California on January 10, 1978.

The International Executive Board is authorized and empowered from time to time, to make such changes, additions or modifications to such plan and to such form of license on the recommendation of the President or as to it, may seem desirable. All of the provisions of such plan for licenses, as well as any and all changes, additions or modifications, and any rules adopted with respect thereto by the International Executive Board, shall have the force and effect of by-laws, and shall supersede any other conflicting or inconsistent provisions. The foregoing is in confirmation, and not in limitation of, the powers and duties of the International Executive Board or of the President under Article 1, Section 1."

FORM OF LICENSE

LICENSE FROM

AMERICAN FEDERATION OF MUSICIANS

(hereinafter called the "Federation")

---to---

.....

(hereinafter called the "Licensee")

This license shall be deemed an agreement by and between the Federation and the Licensee, authorizing the Licensee to be employed by and act as agent, manager or representative for members of the Federation (hereinafter called "Members") in all cases in which the engagement or employment of such members covers services to be rendered.

The license must be signed by the Licensee, or in the case of a firm or corporation by the authorized officers with the corporate seal attached to the license in case the Licensee is a corporation.

This license is subject to, and limited by, the following terms and conditions:

FIRST: The Licensee shall comply with all of the laws, ordinances and requirements of the different localities applying to such agencies.

SECOND: Within the limitations above mentioned, this license shall cover every phase of musical employment, permanent or otherwise.

THIRD: The Licensee shall not act for any musician, including or involving any musical performance, who is not a member in good standing of the Federation.

FOURTH: This license (which is not exclusive) is personal to the Licensee, shall not be transferable, and no person, firm or corporation other than the one named therein shall be entiteld to any advantage therefrom.

FIFTH: All contracts between the Licensee and Members shall, at all times, be subject to, and bound by, the present and future provisions of the Constitution, By-Laws, Rules, Regulations and Resolutions of the Federation and of all Locals thereof, affected thereby, and all such contracts shall contain the following stipulation:

"The present and future provisions of the Constitution, By-Laws, Rules, Regulations and Resolutions of the Federation and its Locals affected hereby, apply to, and shall govern, this contract, and any stipulations in conflict therewith shall be null and void."

SIXTH: The Licensee will not procure any contract or engagement for any member, unless the same shall contain, the following:

"As the musicians engaged under the stipulations of this contract are members of the American Federation of Musicians, nothing in this contract shall ever be so construed as to interfere with any obligations which

they may owe to the American Federation of Musicians by reason of their prior obligation to the American Federation of Musicians as members thereof."

SEVENTH: The obligations of members to the Federation and to its Locals are in no wise to be changed or affected by this license or by any contract or engagement, and such members shall, at all times, remain subject and be amenable to such Federation and its Locals, the Constitution, By-Laws, Rules, Orders, Resolutions and Regulations thereof.

EIGHTH: The Licensee will not solicit or permit any engagement or employment of members, except strictly in conformity with the rules and wage scales of the Federation and its Locals.

NINTH: The Licensee is not to receive, or be entitled to, any commission or compensation, in any form, in advance and no commission or compensation is to become due or be paid, in any form, at any time before the members concerned receive, in full, payment for their services. In no event, and at no time, shall commissions or compensation of any Licensee, agent or anyone associated or connected with them, singly or collectively, have the effect, directly or indirectly, to reduce the net compensation or pay of any member for his services to less than the minimum scale of pay provided by the Federation or its Locals. The Licensee shall receive no commission or compensation for, or in connection with, employment or engagements at such minimum wage scale, except that such compensation or commissions may be deferred for pay-

ment out of future earnings of such member, to the extent only that such future net earnings exceed the scale. No bonus, gratuity or other subterfuge shall be permitted to circumvent these provisions.

TENTH: The Federation will not countenance any breach by the Licensee or members of any contract conforming to the Federation and Local laws and rules; and will use its best efforts to enforce valid claims by Licensees against members.

ELEVENTH: The Licensee is obligated to furnish to the employer the band or orchestra for which he has contracted with him, and none other.

TWELFTH: The Licensee will keep the Federation informed and advised of all contracts, both oral and in writing, made

by or for members; will submit, upon demand, any and all written contracts to the Federation for its inspection and examination; and will furnish upon such demand, full details and particulars of any and all such contracts not in writing.

THIRTEENTH: This license may be terminated by either party, at any time. Such termination shall not affect any then existing contracts or obligations properly created thereunder, during the existence hereof, except that no such obligation or contract shall have the effect of continuing the agency or other such license. Such right of termination of this license shall be absolute at all times, without cause or reason. In the event of the termination of this license, at any time, for any reason, such license represented by this certificate shall be

returned to the Federation, and cancelled.

FOURTEENTH: The Provisions hereof shall be deemed included in, and part of, any and all agreements between the Licensee and Federation members; and acceptance of this license shall constitute a modifiction of all existing agreements between the Licensee and such members, to accord with the terms hereof.

FIFTEENTH: All members are entitled to equal rights and recognition by employers and Licensees, and no discrimination of any kind or nature, shall be permitted against members. No bonuses, rebates, concessions, favors or inducements, of any kind or nature, to any Licensee or employer or anyone else shall directly or indirectly be given, offered

or permitted by anyone, in any form or manner, with the intention or effect of preferring any one member, or group of members, over others. The purpose hereof is to enable all members to compete with one another, on equal terms.

SIXTEENTH: Any default, dispute, controversy or difference arising between the Licensee and the Federation, any Local or any member or members of the Federation, shall be submitted to, and determined by the International Executive Board of the Federation, and the determination of said Board concerning the matters enumerated above shall be conclusive, final and binding on all connected therewith.

SEVENTEENTH: In the event of any violation of the terms hereof by the Lic-

ensee, and the Federation shall have determined that such violation occurred, each and every member of the Federation shall thereby and thereupon be deemed released and discharged of and from any and all engagements and contracts with the Licensee, and of and from any and all claims, of every kind and nature, by the Licensee, against any member of the Federation.

Dated at New York, N.Y.,
This....day of....., 19...

AMERICAN FEDERATION OF MUSICIANS.

By.....
Licensor

.....[L.S.]

Address.....
Licensee

RESPONDENTS' EXHIBIT AA
IN THE DISTRICT COURT

THE REVOLT
OF THE
ACTORS

BY

ALFRED HARDING

1929

NEW YORK

WILLIAM MORROW & COMPANY

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EQUITY MOVES AGAINST EMPLOYEMENT AGENCIES

Not so much could be said of the other policy on which Equity embarked almost simultaneously. For some time the Council had been greately concerned with the number and gravity of the complaints from actors regarding the abuses they encountered when they sought employment through agencies or personal representatives.

On the surface, the plan of the dramatic agency is simple and its proposition fair enough. No actor could hope to keep in touch with all the avenues of employment. Nor is the actor always a good hand at conducting business negotiations. The very qualities which make for artistry in his profession do not help him when it comes to driving a bargain

with the exceedingly shrewd business man a successful producing manager has to be.

The dramatic employment agency, then, aims first to discover what openings there are for actors and what actors are availabe for them; then, to bring actor and manager together; and, if the actor is its client, to secure the best terms possible for him.

Early in the present century the White Rats, then a powerful organization, spent a great deal of money and waged a long campaign to secure the passage of a law through the New York State Legislature to regulate the commission an agency might charge for that service.

The sum finally arrived at as a maximum was half of a week's salary, payable at the rate of five per cent of the salary, during each of the first ten weeks of an engagement.

The agencies were not long in discovering that they could get around the provisions of the law by refusing to apply for the license required of employment agencies, and by calling themselves the "Personal Representative" or the "Manager" of the actor. Such relationships are not regulated by law and they were able to continue to operate with impunity--and without any check on their operations.

With a few notable exceptions, the agencies and personal representatives began to demand ten per cent, or more, of the actor's salary for the entire run of the production, no matter how casual their part in the securing of the engagement might have been.

To some extent, the agencies have claimed, they were forced to make this demand, for certain producing managers were

in the habit of requiring half what the agencies received from the actor for the privilege of casting their productions. Not all of the managers did this, but several Equity investigations over a period of years established the fact that some of the largest and most powerful were guilty of the practice, so there was a certain color to the claim of the agencies in this respect.

In such cases the manager was simply getting a rebate on the salary promised the actor, and the latter was actually paying the manager five per cent, or more, for the privilege of working for him. It was unfair, certainly, but even if the actor suspected it, what could he do about it?

Some of the actors eventually complained to Equity and complained bitterly. The Association appointed a

special committee from the Council and conducted an investigation of the agency situation. All of the agencies were requested to appear before the Council, or its committee, and many of them did so and testified or not as they thought expedient. And from its own members, from managers and from trade papers Equity secured a great mass of information concerning current practices amoung the agencies.

It learned, for instance, that some of the agencies, not content with exacting a ten per cent commission for the life of the contract, were accustomed to receive bonuses at the time an actor registered, and again when the actor signed a contract through their efforts. It was not absolutely required, perhaps, but it was known that there were so many more persons on the agencies' books than there

were places for them that only those actors would be placed in whom the agencies took particular interest. And that bonus was certainly one way to generate such an interest.

There was the case of one agent who turned producer and who, in one or other of his capacities, approached an actress--a member of Equity--for a part in the contemplated production. And when she signed her contract the agent half of the dual personality attempted to claim a commission for placing her with his producer self.

That investigation brought to light the fact that some agencies made a regular practice of covering out of town openings and of hunting up the producer on the morning after with the information that if certain changes were made in the cast--changes which always involved replace-

ments with clients of the agency--the show might still have a chance.

But at the time these facts and others came to light Equity's hands were more or less tied by the terms of its agreement with the Managers' Protective Association, and knowing that action here required a careful and unembarrassed campaign the Association declined to force the issue.

Its failure to move when the investigation had disclosed this state of affairs was not generally understood and on no issue was criticism of the administration more widespread or more bitter than this.

The situation was still more complicated because there were members, some of the them prominent and influential, who had benefited by the existing situation, who found its conveniences out-

weighed its inconveniences and who saw little reason why Equity should mix in the affair and force a change. There were not so many of these actors, but what they had to say often carried considerable authority.*

Just about the time Equity got its negotiations with the Managers' Protective Association in good shape, and the alien actors' policy was on its way to be solved, the New York Agency law was finally and completely knocked into a cocked hat.

The law had, it is true, been more honored in the breach than the observance, but it was the law, nevertheless, and Equity had been considering what it could do to enforce it. Now that was knocked galley west and its knocking was accomplished in this manner:

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* Equity Magazine, July, 1928, page 8.

New Jersey had a law which was in many respects identical with that of New York. Rupert Ribnik, desiring to establish an employment agency, filed an application complying with the conditions of the statute. The New Jersey Commissioner of Licenses, Andrew F. McBride, believing the fees he had listed for certain positions were too high, refused to issue a license.

Ribnik, claiming that the law creating a scale of fees was unconstitutional, took to the courts to compel the issuance of a license. Through all the courts in the State of New Jersey the battle went uniformly in favor of Commissioner McBride; but Ribnik went right on up to the Supreme Court of the United States and there victory was his and the agency law was sunk to the bottom of the legal seas.

For the majority of the Supreme Court, Justices Holmes, Brandeis and Stone dissenting, on May 28, 1928, held that an employment agent was a broker, a middle man, and that his right to charge what he saw fit for his services was no more to be regulated than the butcher, the apartment house owner and the broker who acted as intermediary between the owner and his tenants. The dissenting Justices pointed out that people seeking work were not as free to look about as tenants, and shoppers, and were often under exceptional economic compulsion to accept whatever terms were offered.* But the majority of the Supreme Court took the legalistic attitude with which courts meet so much social legislation--and there was no appeal from that decision.

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* Equity Magazine, October, 1928, page 10.

It seemed hardly likely to Equity that the New York law was any more constitutional than that of New Jersey. It was, after all, the purpose of the law, the principle involved, which had been ruled out, not the phraseology of the law, itself.

Nor did it seem probable that the New York agencies would overlook the significance of the decision, or its applicability to their own business ventures. It had removed the last faint, lingering scruple from the agencies which had made a gesture of obedience and those few which actually had been obeying the law could now be undercut with impunity.

Since there was no possibility of a successful recourse to law Equity, as an other occasions, set out to see what it

could accomplish for the protection of its members through Equity Shop.

The heart of Equity's plan was the requirement that each agent and person representative, in order to do business with Equity members should obtain a permit from the Actors' Equity Association. The permit form contained a number of stringent regulations, among which was the setting of five per cent for not more than the first ten weeks of a play's run as the legal maximum for an employment agency.

For a while, during Equity's deliberations there was a tendency to do away with personal representatives altogether. But there were some in the Council who felt that a good personal representative was of real value to an actor--and that there were good conscientious representatives.

But the Council was determined that anyone enjoying that status should be prepared to demonstrate his value. It was decided that only those willing to guarantee an actor a season of at least twenty weeks, at a salary not less than he had averaged for the past three years, might call themselves his personal representative--if the actor was willing to have him in that capacity--and collect ten per cent of his salary for the term of the engagement.

Existing contracts were not to be interfered with, but if an agent or personal representative wished to take out a permit from Equity he must be prepared to modify those contracts to conform to the Equity conditions.

The regulations as thus worked out were approved by the Equity Council meeting of August 7, and were submitted to the

same Equity general meeting which passed upon the Alien Actors' Policy. Not one single voice was raised in opposition when Berton Churchill, Chairman of the meeting, put the question.

The next meeting of the Council set the date of October 9, 1928, as that on which the agency regulations should go into effect.*

THE AGENCIES FIGHT BACK

Many of the agencies and some of the personal representatives hurried into the Equity office and took out these permits. Others, mostly personal representatives, demurred not only at the commissions al-

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* Equity Magazine, October, 1928, page 31.

lowed by Equity but at certain clauses covering the change or revocation of permits which were undeniably harsh.

This group selected William Edelstein, a Dutch citizen and a resident of England, as the medium for taking the case into Federal Court, rather than the State Courts and secured the legal services of Nathan Burkan, often an opponent of Equity since 1919.

Federal Judge Henry W. Goddard granted a temporary injunction, October 11, 1928, and Equity promptly modified its rulings to exempt Edelstein and his office from the scope of the regulations.

Judge Goddard heard the arguments on both sides on October 19. They were confined entirely to the jurisdiction of the Court. Neither side raised the question as to the necessity for the laws or their fairness as they stood.

Purely on those legal grounds Judge Goddard, on December 4, dismissed the injunction against the Actors' Equity Association, and against all of Equity's Officers, who had been named individually, as such.

But, and this is a point difficult for laymen to understand, although Frank Gilmore, Paul Dullzell and Grant Mitchell, as Officers of the Association, were free to proceed in the enforcement of Equity's agency policies, Judge Goddard held that Edelstein might try for injunctions against them as individuals.

Before he could hear those suits, however, Judge Goddard moved on to other legal pastures and his term in the Federal District Court for Southern New York was taken by the Honorable Frank J. Coleman.

It was Judge Coleman who, on December 28, heard for the first time what the

lawyers term "the merits" of the case. Those are intent of the things people do and the circumstances which, in their opinion, justify their actions.

While this matter was still pending Burkan reached down into his hat and pulled out something quite rare in the way of legal rabbits. It was a petition to the United States Circuit Court of Appeals, praying for a writ of mandamus against Judge Goddard.

Such a writ makes the Judge who rendered the decision a defendant in the case and its granting by the higher court is, in effect, a notice to the trial Judge, to take the suit again -and make the decision right, this time. It is, naturally enough, seldom granted unless the decision of the trial Judge is palpably unfair.

Judge Goddard's decision did not so appear to the Circuit Court of Appeals, consisting at this sitting of Presiding Justice Martin T. Manton and Associate Justices Learned Hand and Augustus N. Hand. They handed down a decision on February 4, 1929, upholding Judge Goddard. And the Supreme Court of the United States refused to review this ruling.

But in the meantime Judge Coleman had granted the injunctions against Gillmore, Mitchell and Dullzell, as individuals, and in a Court Order signed February 1, 1929, forbade them from having anything to do with the agency policies, in their private capacities.

At this stage in the game Equity, and some of its Officers, were free to do anything with regard to the agencies that they might think proper, while other Officers were free officially, but en joined personally. Yet the dividing line

between what they might do as Officers and what they might not do as individuals was so shadowy and ill defined that there was a very decided question as to their freedom of action.

And the path blazed by Edelstein in the Federal Courts might very well be essayed by other agents and personal representatives in State Courts, with the status of Equity's Officers in equal doubt, there.

It was a dilemma in which the Equity Council found all the alternatives very nearly equally unpleasant. Its solution, reached February 5, 1929, was to suspend t e oepration of the regulations against all agents and personal representatives pending an appeal to the Federal Circuit Court of Appeals from Judge Coleman's injunction.*

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* Equity Magazine, February, 1929, page 8.

Equity proved to be rather more scrupulous than was strictly necessary, in this action, for the decision of this court, handed down August 12, 1929, was a sweeping and unqualified acceptance of Equity's arguments as to the legality of its right to so legislate on behalf of its members and of the manner in which it had done so.

The decision, written by Judge Thomas W. Swan and concurred in by Judge A. N. Hand, with Judge Martin T. Manton dissenting without opinion, was of great interest to Labor circles, because of its willingness to accord social and human rights an equality with property rights--a theory not too widely held by American jurists to date.

* * *

OPINION OF THE COURT OF
APPEALS AFFIRMING THE
DECISION OF THE
DISTRICT COURT DIS-
MISSING PETITIONERS' COMPLAINT

H.A. Artists & Associates,

Inc., et al.,

Plaintiffs-Appellants,

v.

Actors Equity Association,

An Unincorporated Association,

And Donald Grody,

Defendants-Appellees.

---

* * *

Before:

LUMBARD, MANSFIELD, Circuit
Judges and BARTELS,
District Judge.*

LUMBARD, Circuit Judge:

Appellants, theatrical agents who act as intermediaries between actors and producers, appeal from a judgment of the District Court for the Southern District of New York, 478 F.Supp. 496 (1979) (Motley, J.), holding certain practices of defendant union Actors Equity ("Equity") immune from challenge under the antitrust laws because protected by the "statutory labor exemption." We affirm.

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*Hon. John R. Bartels, United States District Judge for the Eastern District of New York, sitting by designation.

At issue in this case is Equity's system of "franchising" theatrical agents. Agents pay a fee and agree to abide by certain restrictions in return for certification as "franchised" agents. Equity encourages agents to become franchised by forbidding its members to deal with unfranchised agents. Equity members who negotiate contracts using the services of unfranchised agents are subject to union discipline, including fines.

The most important of the restrictions placed upon franchised agents is the requirement that they renounce any right to take commissions on contracts under which an actor receives scale wages. Scale wages are set by a collec-

tive bargaining agreement between Equity and theatrical producers, to which the agents are not parties. To the extent that a contract includes provisions under which an actor will sometimes receive scale pay (as for rehearsal periods and "chorus" employment) and sometimes more, the franchise regulations deny the agent any commission on the scale portions of the contract. Franchised agents are also precluded from taking commissions on certain expense money paid to union members; commissions are limited on wages within 10% of scale pay; and agents must allow actors to terminate a representation contract if the agent is unsuccessful in procuring employment for the actor within a specified period of time.

Some theatrical agents find this system acceptable, and this group which has

formed a trade association called TARA - is not a party in this litigation.

The district court did not reach the question of whether or not the franchise system is an unreasonable restraint of trade, or constitutes per se illegal price-fixing, because it found that the union's actions in creating and maintaining the franchise system were fully protected by the "statutory" labor exemption from the antitrust laws, which removes from antitrust scrutiny unilateral action by a labor union pursuing the interests of its members. The "statutory" exemption has its source in judicial readings of sections 6 and 20 of the Clayton Act, 15 U.S.C. §17, 29 U.S.C. §52 and of the Norris-LaGuardia Act, 29 U.S.C. §§105-115. Under the leading "statutory" labor exemption case of United States v. Hutcheson, 312 U.S. 219, 61 S.Ct. 463, 85

L.Ed. 788 (1941), the threshold issue is whether or not Equity's franchising of agents has involved any combination between Equity and any "non-labor groups" or persons who are not "parties to a labor dispute." Id. at 232, 61 S.Ct. at 466. If it has, the protection of the exemption does not apply.[1]

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1 If a court finds that there has been an agreement between a union and a "non-labor group", the agreement may still be entitled to antitrust immunity under the "non-statutory" exemption. Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 622, 95 S.Ct. 1830, 1835, 44 L.Ed. 2d 418 (1975). Since both the "statutory" and "non-statutory" exemptions are based on judicial readings of the Sherman, Clayton and Norris-LaGuardia Acts, this choice of terminology seems unfortunate. See I Areeda & Turner, Antitrust (1978) §229 at 192.

Most employers qualify as a "non-labor group,"[2] and the court below considered whether or not there was any agreement, either explicit or tacit, between Equity and the producers to establish or police the franchise system. We do not believe the district court was clearly erroneous in finding that the

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2 An exception is an employer in job competition with his employees, e.g., a bandleader who sometimes both leads a band and plays an instrument. American Federation of Musicians v. Carroll, 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460 (1967).

collective bargaining agreement does not reveal any combination between Equity and the producers with respect to agents, Fed. R. Civ. P. 52(a), Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 694, 85 S.Ct. 1596, 1604, 14 L.Ed.2d 640 (1965).

Appellants argue that the provision in the collective bargaining agreement that standard employment contracts include a space for the actor's agent's name, and another provision of the agreement that requires this line to be filled in, is evidence that the producers agree with Equity to help the union police its francnise system. We disagree. As the district court found, there was evidence that contracts were often executed leaving blank the line left for the agent's

name, and that, even so, Equity honored such contracts and did not take any action against members who worked under such contracts. The provision requiring that every line be filled in far antedated the appearance of the line for "name of agent." The district court was not clearly erroneous in concluding that Equity did not in fact require that this line be filled in.

The collective bargaining agreement aside, appellants argue that various statements made by Equity officials to union members and to producers are evidence of a combination between Equity and the producers with regard to agent franchising. We have examined each of the statements in the record adduced to support this point and we conclude that the district court's finding that they do not

demonstrate any such combination cannot be labeled clearly erroneous. Unilateral pronouncements by Equity such as that "only franchised agents may negotiate employment deals for Equity performers" are not proof of an agreement because they may mean no more than that Equity members are forbidden from dealing with unfranchised agents. Such a prohibition, of course, since it serves the union's self-interest is a matter of proper union concern and does not involve a non-labor group, is safe from antitrust scrutiny under the statutory exemption. United States v. Hutcheson, supra.

There is some evidence in the record that Equity sought the producers' cooperation in enforcing the franchise system during the 1975 negotiations between Equity, TARA and the producers. And

Equity officials did tell their membership that producers had an "obligation" to avoid using unfranchised agents. But such unilateral expressions, in the absence of any indication from the producers that they had agreed to cooperate or that they had accepted Equity's view of their "obligations," is not evidence from which the court was required to find that a "combination" had been formed. Our conclusion is also based on the fact that there was no evidence at trial that any producer had considered himself bound by the union's statements; nor did any producer testify that he had been pressured not to deal with unfranchised agents, or that he had reported unfranchised agents to the union.

But on the record in this case we discern a combination between the union and

individuals who appear as if they might be members of a "non-labor" group. These individuals are those agents who have agreed with the union to become franchised, and these agreements must be scrutinized to determine if they are agreements that would divest Equity's franchise system of the protection of the "statutory" exemption. In our view, they do not because the agents involved are a "labor group."

In American Federation of Musicians v. Carroll , 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460 (1967), the Supreme Court identified the test for distinguishing a labor group from a non-labor group as "...the presence of job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and

the independent contractors. If such a relationship existed, the independent contractors were a 'labor group'..." 391 U.S. at 106, 88 S.Ct. at 1567, quoting 241 F.Supp. at 887. The above language is taken from the Carroll court's discussion of whether or not bandleaders in the "club date" field could be subjected to certain forms of union restrictions. Since the central holding in the case was that the fact that bandleaders sometimes performed as musicians meant that such restrictions were valid, most of the opinion deals with the "job or wage competition" branch of the disjunctive test quoted above. But the Carroll court also approved the musicians' union's restrictions on booking agents' commissions, which were enforced through a "licensing" system analogous to the "franchising" system at issue in the

case at bar, 391 U.S. at 116-17, 88 S.Ct. at 1572-73.

Unlike the bandleaders, the agents in Carroll were not in any kind of "job or wage competition" with union members. The court's sub silentio application of the statutory exemption therefore supports the view that the musicians and the booking agents were in a sufficient "economic interrelationship" to justify union regulation. Because of the vagueness of this term, however, we believe the matter calls for further explanation.

Most unions are in an "economic interrelationship" with the employers of their membership. When the union gains a wage increase, the employers give up corresponding amounts of money (though not necessarily corresponding profits, be-

cause labor costs can often be passed along to consumers). But such an "economic interrelationship" does not suffice to make an employer a "labor group", or even a "party to a labor dispute"; otherwise there would be no need for the "non-statutory" exemption, which was developed largely to provide an exemption for union agreements with employers. Connell Construction Co. v. Plumbers Local 100, 421 U.S. 616, 622, 95 S.Ct. 1830, 1835, 44 L.Ed.2d 418 (1975). To choose a different example, there is an "economic interrelationship" between a labor union and the buyers of goods produced by the union members' employer. If, for example, steelworkers were to win a wage raise of enormous size, various users of steel products, such as automobile manufacturers, would be adversely affected. Yet a combination between the steel-

workers and an automobile manufacturer would not be entitled to the benefit of the statutory exemption because of this "economic interrelationship."

For purposes of this case, it is enough to note that the "economic interrelationship" test has never been used to immunize from antitrust challenge anything more than a union's effort to regulate parties, who, because of industry structure, stand athwart the current of wages paid by employers to union members; and that these efforts have been associated with attempts to defend the integrity of minimum wages. See, e.g., Adams, Ray & Rosenberg v. William Morris Agency, 411 F.Supp. 403 (C.D. Cal. 1976). In industries where it is necessary or customary for union members to secure employment through agents, and agents' fees

are calculated as a percentage of wages set by a collective bargaining agreement, such agents must be considered a "labor group" because the union cannot eliminate wage competition among its members without regulation of the fees of the agents.

Once it is determined that the union's actions have involved no combination with a non-labor group, it remains, under United States v. Hutcheson, supra, only to decide if the goal being pursued is within the area of the union's legitimate self-interest. In the case at bar, Equity, through its franchising system, seeks primarily to protect from encroachment a minimum wage in an industry where the maintenance of a minimum wage poses problems of particular intractability. The possibility that job-hungry actors will work through agents who take

excessive commissions is a matter of legitimate union concern. The goal of the agent restrictions is the elimination of wage competition, traditionally one of the most sacrosanct goals of national labor policy.

To this point, we have been concerned with the core of Equity's franchising system - the securing by the union of an agreement from the agents not to charge commissions on certain types of work obtained. A second aspect of the franchising system, under which the union charges a fee to agents who become franchised, is more troublesome. These fees ($200 for the initial franchise; $60 per year thereafter for each agent, and $40 for any sub-agent working in the office of another), are not segregated from other union funds. While the union argues that

they are necessary to pay the union's expenses in administering the franchise system, no evidence was presented at trial to show that the union's costs justified the franchise fees.

Clearly the union could not, legally, exact more from the agents than it needs to offset the costs of the franchising system. Such exactions would be unconnected with any of the goals of national labor policy which justify the antitrust exemption for labor. Nevertheless, this case in its present posture can best be disposed of by approving the fees as they stand today. There was testimony that at least one full-time Equity employee was engaged in updating lists of franchised agents and correlating contracts with these lists. There was also testimony that approximately 200 theatrical agents

or agencies are affected by the union practices under challenge. Assuming an average yearly charge of $60, Equity's franchising revenues would amount to approximately $12,000. Such a sum, plus initial franchise fees collected during the year, cannot be incommensurate with Equity's expenses in maintaining a full-time employee to administer the system. In such circumstances, a remand to the district court would not serve any useful purpose.

Affirmed.

OCT 20 1980
MICHAEL RODAK, JR., CLI

No. 80-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

H.A. ARTISTS & ASSOCIATES, INC., S.T.E. REPRESENTATION LTD., J. MICHAEL BLOOM, LTD., DON BUCHWALD & ASSOCIATES, INC., MARJE FIELDS, INC., HENDERSON/HOGAN AGENCY, INC., OPPENHEIM-CHRISTIE ASSOCIATES LTD., JOEL PITT LTD., TALENT REPRESENTATIVES INC., D.M.I. TALENT ASSOCIATES, LTD., JEAN THOMAS AGENCY, INC., BOB WATERS AGENCY, INC., JACOBSON-WILDER, INC., WILLIAM D. CUNNINGHAM & ASSOCIATES, INC., TRANUM ROBERTSON & HUGHES, INC., MONTY SILVER AGENCY LTD., BRET ADAMS LIMITED, MICHAEL THOMAS AGENCY, INC., LESTER LEWIS ASSOCIATES, INC., LEAVERTON ASSOCIATES LTD., JOE JORDAN TALENT AGENCY INC., RAGLYN-SHAMSKY, LTD., ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

—against—

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

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Question Presented

Did the Court of Appeals correctly apply *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1967) (*"Carroll"*) by holding that theatrical agents, who obtain employment and negotiate terms of employment for and who stand in an economic interrelationship with union members affecting legitimate union interests, are part of the union's labor group for purposes of the application of the statutory exemption to the antitrust laws and by holding that Actors' Equity Association's regulation of theatrical agents was for a legitimate union purpose?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-348

H.A. ARTISTS & ASSOCIATES, INC., S.T.E. REPRESENTATION LTD., J. MICHAEL BLOOM, LTD., DON BUCHWALD & ASSOCIATES, INC., MARJE FIELDS, INC., HENDERSON/HOGAN AGENCY INC., OPPENHEIM-CHRISTIE ASSOCIATES LTD., JOEL PITT LTD., TALENT REPRESENTATIVES INC., D.M.I. TALENT ASSOCIATES, LTD., JEAN THOMAS AGENCY, INC., BOB WATERS AGENCY, INC., JACOBSON-WILDER, INC., WILLIAM D. CUNNINGHAM & ASSOCIATES, INC., TRANUM ROBERTSON & HUGHES, INC., MONTY SILVER AGENCY LTD., BRET ADAMS, LIMITED, MICHAEL THOMAS AGENCY, INC., LESTER LEWIS ASSOCIATES, INC., LEAVERTON ASSOCIATES LTD., JOE JORDAN TALENT AGENCY INC., RAGLYN-SHAMSKY, LTD., ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

—against—

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS

Respondents Actors' Equity Association and Donald Grody respectfully request that this Court deny the petition for writ of certiorari, seeking review of the opinion of the Second Circuit (Lumbard, Mansfield and Bartels) in this case. That opinion is reported at 622 F.2d 647.

Statement of the Case

Petitioners are theatrical agents who are in the business, *inter alia,* of placing actors in jobs in the legitimate theatre field. Actors' Equity Association ("Equity") is a labor union representing actors in the legitimate theatre field throughout the United States. Equity has long required that theatrical agents representing its members abide by certain regulations ("agency regulations") instituted and maintained by Equity for the purpose of protecting its members from exploitation by theatrical agents.*

Equity has collective bargaining agreements with most theatrical producers throughout the country, establishing the minimum terms and conditions of employment (which vary, depending on the type of production. For Broadway shows, minimum or "scale" was $285 per week as of June 1976). An actor is free to negotiate salary and other terms more, but not less, favorable than those prescribed in the applicable collective bargaining agreement.

As a matter of general industry practice, producers seek actors and actresses for their productions through agents, and an actor without an agent simply does not have the same access to producers or the same opportunity to be seriously considered for a part as does an actor with an agent.

Plagued by historic and endemic high unemployment in the legitimate theatre, actors have been acutely vulnerable to exploitation by theatrical agents, whose activities directly and substantially affect the actor's access to work. Vulnerability to agent overreaching is particularly great for those performers without an established reputation who make up the vast majority of Equity's members.

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* *See Edelstein* v. *Gillmore,* 35 F.2d 723 (2d Cir. 1929).

Equity therefore requires agents representing its members to be licensed by Equity, and requires licensed agents to abide by the union's regulations of their relationship with actor-members, including regulations limiting commissions; regulations limiting the duration and terms of exclusive contracts between actor and agent; regulations designed to ensure performance by agents of their fiduciary obligations to actors and to eliminate conflicts of interest on the part of agents in their representation of actor-members; regulations prohibiting agents from placing actors with producers who still owe actors' salaries from prior productions or have defaulted on other financial obligations under Equity collective bargaining agreements; and regulations facilitating dispute resolution.

In May 1978, Petitioners commenced an action challenging Equity's agency regulations under the Sherman Act. Following denial by the District Court of Petitioners' motion for preliminary injunction and affirmance by the Court of Appeals of said denial, the District Court, after a bench trial, dismissed the complaint, holding that Equity's agency regulations were protected by the statutory exemption to the antitrust laws. The Court of Appeals affirmed.

In affirming the judgment of the District Court, the Court of Appeals upheld the findings that the agents were in an economic interrelationship with union members affecting legitimate union interests within the meaning of the first prong of the *Carroll* statutory labor exemption test, and that the goal pursued by Equity in the regulation of agents was within the area of the union's legitimate self-interest under the second prong of the statutory labor exemption test. The Court of Appeals stated:

> In the case at bar, Equity, through its franchising system, seeks primarily to protect from encroachment a minimum wage in an industry where the maintenance

> of a minimum wage poses problems of particular intractability. The possibility that job-hungry actors will work through agents who take excessive commissions is a matter of legitimate union concern. The goal of the agent restrictions is the elimination of wage competition, traditionally one of the most sacrosanct goals of national labor policy.
>
> (App. A3(c)-A4-A4(c))*

Reasons for Denying the Writ

The petition for certiorari should be denied because the Second Circuit's decision is a clearly correct and routine application of *Carroll* and its progeny. Every court which has considered the matter has ruled consistently with the Second Circuit's decision here. Petitioners have presented no reason for the granting of certiorari other than a desire to have this Court review a lower court's application of established precedent.

A. None of the Considerations Governing Review on Certiorari Obtains Here.

The considerations cited in Rule 19 of the Rules of the Supreme Court as militating for the granting of review on a writ of certiorari are notably absent in the instant case. In relevant part, Rule 19 states that the following indicates the character of reasons which will be considered.

> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; . . . or has decided an important question of federal law which has not been,

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* References to pages in Petitioners' appendix denominated "*(continued)*" will appear in this form.

> but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

None are present here.

The decision below is not in conflict with any decision of another court of appeals on the same matter. Indeed, each and every court decision on the matter has been consistent with and supportive of the Second Circuit's decision.*

The Court of Appeals has not "decided an important question of federal law which has not, but should be, settled by this court." There is no suggestion that regulation of agents has been of concern to labor unions anywhere other than in the entertainment industry, where it is "necessary or customary for union members to secure employment through agents"; where "because of industry structure, [agents] stand athwart of wages paid by employers to union members" (App. A3(c)-A4); and where, because of extreme job scarcity, agents are in a unique position to exploit the employees they represent. The issue is thus not one of general application or importance.

But even assuming that an "important question of federal law" is involved, it has *already been* decided by this court. *Carroll, supra.* As is shown below, Petitioners' efforts to distinguish this case from *Carroll* are completely unavailing.

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* *Carroll, supra; Adams Ray & Rosenberg* v. *William Morris Agency*, 411 F.Supp. 403 (C.D.Cal. 1976); *Garrett* v. *American Fed. of Musicians*, 98 L.R.R.M. 2078 (D.S.C. 1978); *Redfield* v. *American Fed. of Musicians*, 603 F.2d 214 (2d Cir. 1979).

Finally, there is no suggestion that the Second Circuit "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." To the contrary, the Second Circuit's decision constituted reasoned and correct affirmance of a careful and correct District Court opinion.

B. The Second Circuit Correctly Applied the Statutory Labor Exemption Under *Carroll* to the Facts of the Instant Case.

Because of the broad literal reach of the Sherman Act, Congress enacted statutes to make clear that the antitrust laws were not intended to reach legitimate labor union activities. See Sections 6 and 20 of the Clayton Act (29 U.S.C. §§17 and 52) and the Norris-LaGuardia Act (29 U.S.C. §§101-115). Under what has come to be known as the "statutory exemption" * to the antitrust laws, union activity undertaken for a legitimate union purpose and not in combination with any non-labor group is exempt from the antitrust laws. *United States* v. *Hutcheson,* 312 U.S. 219 (1941).

Among the protections that Equity has long provided for its members is the regulation of theatrical agents who are in the business of obtaining employment for actors

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* What has come to be known as the "nonstatutory labor exemption" protects combinations with non-labor groups (*e.g.*, employers in collective bargaining relationships) concerning subjects intimately related to wages, hours and working conditions and involving restraints on competition no broader than necessary to accomplish the union's legitimate purpose. In view of the findings of both courts below that Equity did not combine with non-labor groups (App. A2(c)-A3; App. B4(c)-B5), Petitioners do not assert that the nonstatutory exemption is before this Court. Thus, *Connell* v. *Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616 (1975) and other nonstatutory exemption cases have no application here.

and taking a percentage of earnings as commission. The evidence at trial amply established that the purpose for Equity's institution fifty years ago and maintenance to date of its agency regulation system was to protect its historically under-employed members from exploitation by theatrical agents who susbtantially affect an actor's access to employment opportunities. One of the principal purposes of Equity's regulations is to insure that minimum wage scales not be undermined by commissions charged by agents.

In *Carroll,* the Court held that similar agency regulations by the American Federation of Musicians ("AFM") were protected by the statutory exemption of the antitrust laws. Like Equity's* agency regulations, the AFM's regulations sought to protect union members from abuses by booking agents acting on their behalf, and to preserve minimum terms and conditions of employment. In affirming the decisions of the District Court and Court of Appeals on this issue,** this Court found (1) that the agents were in an economic interrelationship with the union members affecting legitimate union interests and were therefore part of the labor group within the meaning of the statutory exemption to the antitrust laws, and (2) that

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* The parallel to the legitimate theatre field was noted by the District Court in *Carroll,* 241 F.Supp. 865, 892-93:

"Apparently, similar abuses by booking agents existed in other fields, too. *Edelstein* v. *Gillmore,* 35 F.2d 723 (2d Cir. 1929) (actors)."

** The Court of Appeals in *Carroll* affirmed the District Court in upholding the agency regulations.

It should be noted that Justice White's dissent in *Carroll* (referred to in the Petition, pp. 15-16) focussed not on the AFM's regulation of booking agents, but on the AFM's requirement that band leaders functioning as employers charge fixed prices to customers which exceeded the leader's total "wage bill" (391 U.S. at 117). The latter issue is not present in this case.

the regulations were instituted for a legitimate union purpose.

Based on the same considerations, both courts below correctly held the statutory labor exemption shields Equity's agency regulation from antitrust liability.

The grounds relied on by petitioners in their attempt to distinguish the instant case from *Carroll* are inaccurately characterized, and/or irrelevant to the core statutory labor exemption criteria.

Thus, petitioners incorrectly suggest that the AFM's agency licensing system applies only to booking agents who book musicians into "club-date" engagements, where there are typically no collective bargaining agreements.* In any event, the existence of collective bargaining agreements merely obviates the need for a specific prohibition against one of many agency abuses, *i.e.*, negotiating less than minimum scale. It in no way affects the need for regulations which address other legitimate union concerns, including

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* The Second Circuit's *Carroll* decision noted that both the steady engagement field and non-club date single engagements "are ordinarily governed by collective bargaining agreements concluded by the union and the 'purchaser' of music." 372 F.2d at 158. It went on to observe:

> *Most engagements are secured through booking agents, who since 1936 have been regulated by the Federation and its local unions,* because during the depression booking agents took advantage of the job shortages in the music industry by charging exorbitant commissions. Under present union by-laws, union members are forbidden to accept engagements from booking agents not licensed by the Union. *The licensing agreements limit the commissions of booking agents to 10% for steady engagements* and 15% for single engagements; and the agents must agree not to book non-union orchestras or musicians or to book orchestras for engagements at less than the union scale.

Id. at 159 (emphasis supplied). The presence of collective bargaining agreements outside the club date field was also noted by the District Court (241 F.Supp. at 883-884) and by this Court (391 U.S. at 104, n. 6).

the regulation of commissions and the preservation of minimum scale from invasion by agents' commissions.*

Nor does the regulation of theatrical agents by the State of New York affect the exemption of Equity's agency regulation from the antitrust laws. While the Court in *Carroll* was silent on the issue of government regulation, the AFM licensing agreement before the Court in *Carroll* clearly assumed the existence of state regulations by requiring the licensed agent to "comply with all the laws, ordinances, and requirements of the different localities applying to such agencies," and the New York General Business Law clearly includes agents representing musicians in its ambit.** More fundamentally, the existence of a state statute providing some protections to members of a labor union should not affect the union's right to provide greater protections.***

The economic interrelationship between an agent and the union member whose employment he obtains is one clearly

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* Both courts below found that the same bona fide union concerns regarding exploitation that were present in *Carroll* were present here. Contrary to Petitioners' contention (pet. 15), record evidence supports the dual court findings. (*See, e.g.*, Appellees' Brief to the Court of Appeals, Docket No. 79-7821, p. 5).

** The New York General Business Law set a twenty-percent ceiling on commissions on employment booked for orchestras in the opera and concert field, App. G7, Par. 8, while the AFM regulations permitted only fifteen percent commission and barred commissions on scale compensation.

*** Even assuming *arguendo* (and there was evidence to the contrary) that New York's law is adequately enforced, Equity's agency regulation system protects its nationwide membership and not only those dealing with agents who operate in New York. Moreover, the New York law fails even to address crucial aspects of the actor-agent relationship which are covered by Equity's agency regulations. For example, Equity regulates the duration of exclusive contracts between actor and agent and provides for release of an actor from an exclusive contract where the agent has not provided work within specified time limits or where sub-agents whom the actor relied upon to be working with him have left the agency.

affecting legitimate union interests whether or not the agent happens to be a full-time agent, a part-time agent, or an agent who sometimes functions as a performer. Petitioners offer no rationale for their contention that the court below (and other courts in other cases) have "indiscriminately extended" *Carroll* to cases involving full-time professional independent agents (Pet. 12). Indeed, some of the petitioners in *Carroll* functioned solely as agents. *See* 391 U.S. at 103, n.5.

Petitioners argue that the Second Circuit improperly extended *Carroll* to "permit unions to require agents to work for nothing." The AFM's licensing agreement in *Carroll,* like Equity's agency regulations, prohibited commission on scale jobs. As was reflected in the testimony at trial, the nature of the talent agency business involves a gamble. An agent may on some occasions expend efforts without remuneration in an effort to develop a relationship with an actor who will hopefully soon command high earnings, and on other occasions reap 10% of a high weekly salary over an extended period of time for doing little more than picking up the telephone.

Finally, Petitioners contend that the Court of Appeals erroneously upheld the franchise fees charged by Equity to agents. Equity's nominal fees ($60 per year per agent) yield approximately $12,000 per year (App. A4(c)).* The Second Circuit and the District Court found, respectively, that the franchise fees are not "incommensurate with Equity's expenses in maintaining a full-time employee to administer the system" (App. A4(c)) and are "reasonably related to the operation of the franchise systems and the

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* The evidence disclosed that the administrative costs of the franchising system exceeded the income from these nominal fees. *See, e.g.,* Trial Transcript p. 643.

system's protection of wage scales and working conditions" (App. B9(c)). A factual finding by two courts should not be disturbed in the absence of a very obvious and exceptional showing of error. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949). The Court of Appeals properly found that the Union's imposition of fees to offset the cost of the franchising system was "within the area of the union's legitimate self-interest," and not an "exaction[] . . . unconnected with any of the goals of national labor policy which justify the antitrust exemption for labor" (App. A4(c)).

C. Petitioners' Tacit Invitation to Overrule *Carroll* Should Be Declined.

To the extent Petitioners are suggesting that *Carroll* should be overruled, this invitation should be rejected. Petitioners fail to present any justification for this Court's departure from a policy of *stare decisis* which applies with particular force in the area of statutory interpretation.* Very little litigation has been occasioned over the application of *Carroll*, and its continuing validity was recently noted by this Court in *Connell, supra*, 421 U.S. at 622.

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* *See, e.g., Edelman* v. *Jordan*, 415 U.S. 651, 671, n. 14 (1974), quoting *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (Brandeis, J., dissenting).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: New York, New York
October 20, 1980

Respectfully submitted,

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DEC 1980

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-348

H.A. ARTISTS & ASSOCIATES, INC.; S.T.E. REPRESENTATION LTD.; J. MICHAEL BLOOM, LTD.; DON BUCHWALD & ASSOCIATES, INC.; MARJE FIELDS, INC.; HENDERSON/HOGAN AGENCY INC.; OPPENHEIM-CHRISTIE ASSOCIATES LTD.; JOEL PITT LTD.; TALENT REPRESENTATIVES INC.; D.M.I. TALENT ASSOCIATES, LTD.; JEAN THOMAS AGENCY, INC.; BOB WATERS AGENCY, INC.; JACOBSON-WILDER INC.; WILLIAM D. CUNNINGHAM & ASSOCIATES, INC.; TRANUM ROBERTSON & HUGHES, INC.; MONTY SILVER AGENCY LTD.; BRET ADAMS, LIMITED; MICHAEL THOMAS AGENCY, INC.; LESTER LEWIS ASSOCIATES, INC.; LEAVERTON ASSOCIATES LTD.; JOE JORDAN TALENT AGENCY INC.; RAGLYN-SHAMSKY, LTD.; ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

against

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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Questions Presented

The questions presented must be considered in light of major factual differences between *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 (1968) *("Carroll"),* the authority followed by the Courts below, and this case. In *Carroll,* the defendant union did not have a collective bargaining agreement with the employers of the union's members and the booking agents, who obtained jobs for the union members, were not licensed as employment agencies under New York State law. In the present case, Actors' Equity Association ("Equity" or the "Union"), the defendant union, has collective bargaining agreements with the employers of its members which set forth the minimum wages the employers must pay union members, and the theatrical agents are licensed as employment agents.

The questions presented for review are:

1. Should the holding in *Carroll* that booking agents are members of a "labor group" and thus can be regulated with antitrust immunity by the union whose members they represent be confined to fact situations where the union does not have a collective bargaining agreement with the employers of its members?

2. Should *Carroll,* which primarily dealt with a union's fixing the prices charged to clients by orchestra leaders (who are themselves union members who compete with union members and who employ union members) be overruled to the extent that it holds that agents who are employed by union members are part of the union's "labor group"?

3. Should the holding in *Carroll* permit Equity to forbid licensed theatrical agents from charging commissions on scale or minimum jobs obtained for Equity members?

4. Should the holding in *Carroll* be extended to permit the Union, which prohibits its members from employing theatrical agents who are not franchised by the Union, to extract franchise fees from theatrical agents as payment for the right to be regulated and dominated by the Union?

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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-348

H.A. ARTISTS & ASSOCIATES, INC.; S.T.E. REPRESENTATION LTD.; J. MICHAEL BLOOM, LTD.; DON BUCHWALD & ASSOCIATES, INC.; MARJE FIELDS, INC.; HENDERSON/HOGAN AGENCY INC.; OPPENHEIM-CHRISTIE ASSOCIATES LTD.; JOEL PITT LTD.; TALENT REPRESENTATIVES INC.; D.M.I. TALENT ASSOCIATES, LTD.; JEAN THOMAS AGENCY, INC.; BOB WATERS AGENCY, INC.; JACOBSON-WILDER, INC.; WILLIAM D. CUNNINGHAM & ASSOCIATES, INC.; TRANUM ROBERTSON & HUGHES, INC.; MONTY SILVER AGENCY LTD.; BRET ADAMS, LIMITED; MICHAEL THOMAS AGENCY, INC.; LESTER LEWIS ASSOCIATES, INC.; LEAVERTON ASSOCIATES LTD.; JOE JORDAN TALENT AGENCY INC.; RAGLYN-SHAMSKY, LTD.; ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

against

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

Opinions Below

The opinion of the Court of Appeals is reported at 622 F.2d 647 [J.A.[1] 332]. The opinion of the District Court is reported at 478 F.Supp. 496 (S.D.N.Y. 1979) (Motley, J.) [Pet. App. B1].

Jurisdiction

The judgment of the Court of Appeals was entered on May 23, 1980. The Petition for a Writ of Certiorari was filed on August 19, 1980 and was granted on November 17, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254.

Statutes Involved

1. Section 1 of the Sherman Act (15 U.S.C. § 1) provides, in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared illegal . . ."

2. Section 2 of the Sherman Act (15 U.S.C. § 2) provides, in pertinent part:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

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[1] As used herein: "J.A." refers to the Joint Appendix, "R." refers to the Record, and "Pet. App." refers to the appendices annexed to the Petition for Certiorari.

3. Section 6 of the Clayton Act (15 U.S.C. § 17) provides, in pertinent part:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

4. Section 20 of the Clayton Act (15 U.S.C. § 15) [Pet. App. E1].

5. Sections 5-15 of the Norris-LaGuardia Act (29 U.S.C. §§ 105-115) [Pet. App. F1].

6. Sections 180, 183 and 185 of Article 11 ("Employment Agencies") of the General Business Law of the State of New York (McKinney 1968) [Pet. App. G1].

Statement of the Case

A. Introduction

Petitioners are theatrical agents (sometimes hereinafter referred to as "Agents")[2]. Equity is a union whose

[2] The National Association of Talent Representatives ("NATR") is a trade association of agents who represent actors in the legitimate theatre field and other fields including television and motion pictures. All the Agents are members of NATR, but not all NATR members

members include virtually all actors appearing in legitimate theatrical productions in the United States. Respondent, Donald Grody, was Executive Secretary of the Union.

This is an action for injunctive relief (only) under §16 of the Clayton Act (15 U.S.C. §26) alleging that the Union's conduct is violative of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2). The Agents claim that the Union's compulsory franchising system for theatrical agents which prohibits Union members from dealing with nonfranchised agents such as petitioners constitutes a price fix, an agreement not to compete, a group boycott of nonfranchised agents and monopolization in violation of the Sherman Act. The Union contends that theatrical agents are part of its labor group and therefore its regulation of agents is immune from the operation of the antitrust laws.

B. Statement of Facts

> "Actors' Equity has collective bargain agreements with most major theatrical producers in New York and elsewhere, with most off-Broadway producers, and with many other theatrical producers throughout the United States. The terms negotiated

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are plaintiffs. [J.A. 62]. Most of the Agents are small agencies employing no more than 2 or 3 agents. They represent very few "stars". [J.A. 76, 100]. Theatrical Artists Representative Associates ("TARA") is a trade association of agents working in the legitimate theatre field who compete with the Agents. TARA is the designated bargaining representative for all theatrical agents under the present Equity Agency Regulations, as it was under "Rule A", the Union's predecessor franchising system. [Pl. Ex. 71, R. 44 (p. 380), J.A. 209; Pl. Ex. 106, R. 43 (p. 162); J.A. 51-58; R. 43 (pp. 123, 236); J.A. 184-85]. TARA's members include the William Morris Agency ("William Morris"), and International Creative Management ("ICM"). William Morris and ICM are the two largest theatrical agencies. They employ approximately 200 agents each and represent "many stars". William Morris rarely obtains employment for its clients at scale or minimum wages. [R. 43 (pp. 230-235)]. The offices of William Morris serve as the offices and mailing address of TARA. [R. 43 (p. 237)].

with various producer groups are the minimum terms and conditions of employment. An actor is free to negotiate salary or terms more favorable than those prescribed in the collective bargaining agreement, but neither the actor nor the producer [nor the agent] is permitted to diminish the wages set forth in the relevant collective bargaining agreement.

Theatrical agents are independent contractors in the business of placing their actor clients in jobs with producers.[3] Theatrical agents receive commissions, based on a percentage of earnings of the client, only if they succeed in obtaining employment for their clients.

Theatrical agents who operate in New York City [including all petitioners] are required to be licensed as employment agencies and are regulated by the Department of Consumer Affairs of New York City pursuant to article 11 of the General Business Law of the State of New York, which sets the maximum commissions [10%] employment agencies may charge and has specific provisions[4] dealing with theatrical agents.

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[3] Theatrical agents also perform the following functions on behalf of their actor-clients: mailing resumes, pictures and tapes to producers in order to familiarize producers with an actor's ability; introducing actors to producers and casting directors; counselling actors involved in out of town productions and, at times, travelling to out of town productions; attending Broadway productions in which clients are appearing, and accompanying producers to view such productions; and counselling actors in all aspects of developing their careers. [J.A. 77-83, 91-95]. Theatrical agents incur the following expenses, none of which are reimbursable by their clients: travelling to out of town productions to view their clients perform; entertaining producers and casting directors in order to acquaint them with clients; entertaining clients; mailing "submissions" (resumes, biographical material, etc.) to producers; attending Broadway productions. [J.A. 79-83].

[4] *See* §§ 180, 183 and 185 [Pet. App. G].

As a matter of general industry practice, producers seek actors and actresses for their productions through agents. . . . [A]n actor without an agent does not have the same access to producers or the same opportunity to be seriously considered for a part as does an actor who has an agent." 478 F.Supp. at 497 [Pet. App. B2].

"At issue in this case is Equity's system of 'franchising' theatrical agents. Agents pay a fee and agree to abide by certain restrictions in return for certification as 'franchised' agents. Equity encourages agents to become franchised by forbidding its members to deal with unfranchised agents. Equity members who negotiate contracts using the services of unfranchised agents are subject to union discipline, including fines." 622 F.2d at 648 [J.A. 334].

"In order to enforce its rule that members deal only through franchised agents, Actors' Equity has advised members that they could be disciplined for dealing with nonfranchised agents. It was Actors' Equity's practice to send a letter to an actor dealing with a nonfranchised agent, warning the actor that he could be disciplined—a copy of the letter was also sent to the nonfranchised agent. In 1979, Actors' Equity began disciplinary proceedings against members who were dealing with nonfranchised agents [such as petitioners]—members who would not agree to cease dealing with nonfranchised agents were fined after hearings." 478 F.Supp. at 499 [Pet. App. B4].

"The most important of the restrictions placed upon franchised agents is the requirement that they renounce any right to take commissions on contracts under which an actor receives scale wages.

> Scale wages are set by a collective bargaining agreement between Equity and theatrical producers, to which the agents are not parties. To the extent that a contract includes provisions under which an actor will sometimes receive scale pay (as for rehearsal periods and 'chorus' employment) and sometimes more, the franchise regulations deny the agent any commission on the scale portions of the contract. Franchised agents are also precluded from taking commissions on certain expense money paid to union members; commissions are limited on wages within 10% of scale pay; and agents must allow actors to terminate a representation contract if the agent is unsuccessful in procuring employment for the actor within a specified period of time." 622 F.2d at 648 [J.A. 334-35].

For the privilege of representing actors, agents are required to pay franchise fees to Equity. These fees are deposited by Equity in its general treasury and Equity makes no attempt to cost justify the amounts it charges as franchise fees. The franchise fees:

> ". . . are not segregated from other union funds. While the union argues that they are necessary to pay the union's expenses in administering the franchise system, no evidence was presented at trial to show that the union's costs justified the franchise fees." 622 F.2d at 651 [J.A. 349-50].

The basic restrictive elements of the above described system for the regulation of theatrical agents have been continuously in effect since 1928, when the Union unilaterally established a licensing or franchising system for the regulation of agents. [J.A. 49-50].

In the 1950's, discussions were held between the Union and TARA, as the bargaining representative for all agents, for the purpose of modifying the Union's unilateral agency regulations. As a result of the negotiations, agency regulations known as "Rule A" [Pl. Ex. 106, R. 43 (p. 162)] were promulgated, effective June 4, 1958. Equity required TARA members and other agents seeking to represent Equity members to become franchised by Equity, under Rule A. In or about 1975, TARA and Equity commenced discussions with respect to modifications of Rule A. [J.A. 59]. The negotiations had been commenced at the request of TARA due to the "economic plight" of the agents under Rule A. TARA described Rule A as "not permit[ting] franchised agents to earn back the cost of operating an efficient organization in New York, let alone make a profit." [Pl. Ex. 3, R. 45a (p. 785), J.A. 196].

TARA's "main demand" during the TARA-Equity negotiations was modification of the commission structure to allow agents to charge 10% on all wages received by an actor (including minimum or scale jobs) pursuant to the collective bargaining agreements between Equity and the producers. [J.A. 82-85, 123-25].

On January 6, 1977, after TARA and Equity had been unable to agree on new agency regulations, TARA "terminated" Rule A. [J.A. 60]. As a result, most or all TARA agents, and some other agents, became unfranchised and were not permitted to represent Equity members unless a pre-existing agency contract between the agent and the Equity member was still in force. [J.A. 60]. The TARA-Equity negotiations continued after Rule A had been terminated. [R. 43 (p. 246)]. Because of their dissatisfaction with the acquiescence of the TARA leadership to Equity during the negotiations, the Agents, by letter

dated August 31, 1977, advised the Union that they had resigned from TARA, stating:

> ". . . [we] cannot in good conscience accept the terms and proposals being negotiated by Equity and TARA." [Pl. Ex. 67, R. 43 (pp. 136, 165, 166), J.A. 207].

Thereafter, TARA and Equity reached agreement on new Equity Agency Regulations. These regulations were reduced to writing in October 1977. [Pl. Ex. 71, R. 44 (p. 380), J.A. 209]. Subsequently, most TARA agents who were franchised prior to January 7, 1977 became refranchised. [J.A. 62, R. 43 (p. 258)]. TARA's decision to approve the new Equity Agency Regulations, which bind all franchised agents, was made by a membership vote of approximately 10 to 5. At the time of the vote, there were only 20 members left in TARA. [R. 43 (p. 278), 45 (p. 747)]. TARA was coerced into accepting the new Equity Agency Regulations. As Howard Hausman, a William Morris talent agent and attorney and the head of the TARA negotiating committee, testified:

> "We all consider that Equity's point of view was indefensible, outrageous, horrible, wrong, simply because they were expecting agents to subsidize the lowest paid actors, somehow to work for them without any way of getting paid.
>
> We still all feel that way. We accepted a deal under which that was imposed on us. That is the way in which we accepted it." [J.A. 125-26].

The new Equity Agency Regulations, *inter alia,* prohibit commissions: on scale jobs, on chorus jobs, on rehearsal pay and on out-of-town expense money. *In fact, the new regulations eliminate those limited areas in which commissions on scale were previously allowed.* [Pl. Ex. 71, R. 44 (p.

380), J.A. 209]. Most of the Agents have remained unfranchised since January 6, 1977. [J.A. 63]. Because of continuing pressure brought by the Union upon the Agents and their actor-clients (Union members who employ petitioners), the petitioners commenced this action in May 1978.

C. Proceedings Below

The complaint and the Agents' motion for a preliminary injunction prohibiting the Union and its members from boycotting the Agents during the pendency of this action were filed on May 26, 1978. The District Court denied the motion for a preliminary injunction [Pet. App. D1]. The Court of Appeals, in a memorandum opinion, affirmed [Pet. App. C1]. The bench trial of the action commenced on June 21, 1979. On October 24, 1979, Judge Motley rendered her decision [Pet. App. B1] dismissing the complaint. On May 23, 1980, in an opinion written by Judge Lumbard [J.A. 332], the Court of Appeals affirmed.

Summary of Argument

The Union's franchising system violates the Sherman Act because:

> A. It constitutes a group boycott which totally prevents the Agents from serving as agents for actors and forecloses them from competing with Union-franchised agents. *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klors, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959);
>
> B. Its regulation of agents' commissions constitutes both horizontal and vertical price fixing. *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968); *Dr.*

Miles Medical Co. v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975);

C. It constitutes an agreement not to compete by horizontal competitors. *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *United States* v. *General Dyestuff Corp.*, 57 F.Supp. 642 (S.D.N.Y. 1944); *Duplan Corp.* v. *Deering Milliken, Inc.*, 444 F.Supp. 648, 683-684 (D.S.C. 1977), *aff'd. in part*, 594 F.2d 980 (4th Cir. 1979), *cert. denied*, 444 U.S. 1015 (1980);

D. It permits the Union to use its legal monopoly over the services of actors to illegally monopolize the business of rendering agency services to actors. *See Packaged Programs, Inc.* v. *Westinghouse Broadcast Co.*, 255 F.2d 708, 710 (3rd Cir. 1958), and cases cited therein; and

E. The Union's activities are not protected by the labor exemption to the antitrust laws.

The labor exemption from the antitrust laws is discussed at length in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616, 621-623 (1975) ("*Connell*"). It consists of a non-statutory and a statutory exemption. The latter immunizes unilateral union action if that "action is in the union's self-interest in an area which is a proper subject of union concern". *Intercontinental Container Transport Corp.* v. *New York Shipping Association*, 426 F.2d 884, 887 (2d Cir. 1970). *See United States* v. *Hutcheson*, 312 U.S. 219 (1941).

"The 'statutory' exemption has its source in judicial readings of sections 6 and 20 of the Clayton Act, 15 U. S. C. §§ 17, 29 U. S. C. § 52, and of the Norris-LaGuardia Act, 29 U. S. C. §§ 105-115" 622 F.2d at 648 [J.A. 336].

The Courts below dismissed the petitioners' complaint on the ground that the Union's franchising system for theatrical agents was within the statutory exemption because the theatrical agents are part of the Union's labor group and because the franchising system furthers legitimate labor objectives. The lower Courts' rulings are predicated upon two crucial, erroneous holdings: (1) the franchising system protects Union wage scales, and (2) the franchising system eliminates wage competition between Union members.

Union regulation of agents has no bearing upon wage competition between Union members nor did the Union offer any evidence with respect to this issue. The holding that the Union franchising system operates to protect scale wages is a misconstruction of *Carroll.* In *Carroll* the booking agents for musicians were held to be part of the Union's labor group ***because the union did not have a collective bargaining agreement with the employers of its members.*** Accordingly, it was necessary for the Union to regulate the agents who directly paid Union members, in order to assure that Union members were paid the scale wages unilaterally mandated by the Union. *In addition, the court in Carroll specifically found that booking agents charged exorbitant commissions (i.e. in excess of 15%) and booked jobs for Union members at less than scale wages.* No such findings have or could be made in the instant case because: (1) the minimum wages payable to Equity members are determined by collective bargaining agreements between Equity and the producers who employ the members of Equity, (2) Equity members are paid *directly* by the producers, (3) the producers must post a bond guaranteeing such payments, and (4) all petitioners are regulated by state law as licensed employment agencies who cannot charge commissions in excess of ten percent. Under these circumstances, the agents may be able to affect the disposable income of their actor clients (just as, for example, landlords do), but the agents

cannot affect the minimum wages that producers must pay directly to Union members.

If this Court disagrees with the petitioners' interpretation of *Carroll*, it should overrule *Carroll* because the federal policy of fostering competition, which prohibits, as *per se* violations of the antitrust laws, the Union's group boycott, price fixing and agreements not to compete, far outweighs, in these circumstances, the conflicting federal labor policy which encourages collective bargaining and related Union activity. It should be noted in this regard that the complete elimination of the franchising system will in no way affect Equity's collective bargaining agreements with producers.

If this Court sustains the validity of the Union franchising system, it should nevertheless strike two of its most onerous provisions: (1) the prohibition of commissions on scale or minimum wage jobs, and (2) the requirement that agents must pay annual and initial fees to the Union for the privilege of being dominated and regulated by the Union. There is absolutely no justification or legitimate labor objective for the Union's requirement that agents must work for nothing when they obtain scale jobs (which can be as high as $600 per week) for Union members. While the Courts below attempted to rationalize the Union's need to regulate maximum commissions (which cannot exceed 10% under state law), no effort was made to explain why Union members need not pay any commissions when they accept various jobs obtained for them by agents. Similarly, the Courts below failed to explain how any legitimate labor objective is furthered by requiring agents to pay franchise fees to Equity. Such payments have no effect upon the minimum wages mandated by Equity's collective bargaining agreements and are illustrative of the Union's use of its monopoly power over 23,000 actors to exploit agents by

extracting Union subsidies from them. As the Court noted in *United States* v. *Griffith,* 334 U.S. 100, 108, (1948):

> "If monopoly power can be used to beget monopoly, the [Sherman] Act becomes a feeble instrument indeed."

POINT I

The *Carroll* Case Holding That Booking Agents for Musicians Are Part of a Union Labor Group Should Not Apply Here Because of the Peculiar Facts and Circumstances of the Club Date Music Industry, Which Operates *Without Collective Bargaining Agreements.*

In holding that Agents were part of the Union's labor group, the Courts below relied primarily on this Court's decision in *Carroll.* That reliance was error and improperly extended the *Carroll* holding, which applied only to musicians' booking agents in the unique club date field, to theatrical agents who operate under vastly different conditions. If this Court nevertheless finds that the lower Courts have properly interpreted *Carroll,* that decision should be overruled to the extent it applies to agents.

A. The Courts Below Improperly Interpreted and Extended This Court's Decision in Carroll.

The most unusual circumstance in *Carroll* which makes it so different from the subject case is the fact that *the union in Carroll, the American Federation of Musicians ("AFM"), did not have a collective bargaining agreement with the employers of its members* in the peculiar club date field. The conclusion of the District Court that "the Court's holding in *Carroll* was in no way limited to those instances where union members were not employed under collective bargaining agreements" (478 F.Supp. at 502) [Pet. App. B 7] is not borne out by the Supreme Court's

opinions. Thus, the Supreme Court stated: "The union practices questioned here are mainly those applied to 'club-date' engagements of union members" (391 U.S. at 102), and "There are no collective bargaining agreements in the club-date field" (*id.* at 104). In footnote 6 (*id.*) the Court noted that the distinction between the club-date engagements, which are not governed by collective bargaining agreements, and non-club-date engagements, which are, "is vital".[5]

The majority and dissenting opinions clearly demonstrate that the Supreme Court in *Carroll* was dealing with unilateral union practices involving club-date engagements that were not the subject of collective bargaining agreements, which would have rendered the union's minimum wage regulations and other unilateral practices superfluous. Justice White began his dissenting opinion by stating, "In my view the Court is misled by the peculiar role of bandleaders and the *peculiar economics of the club-date industry* . . . ." 391 U.S. at 114 (emphasis supplied). In concluding, Justice White noted, "By combining with a nonlabor group, the musicians union has obtained effective control of the entire club-date industry." *Id.* at 121. The majority opinion noted that "Club-date engagements are rigidly regulated by unilaterally adopted union bylaws and regulations." *Id.* at 104. These by-laws and regulations were the subject of the plaintiffs' antitrust claims.

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[5] Similarly, the District Court in *Carroll* held:

"The defendant unions do not bargain collectively either with orchestra leaders or purchasers of music in the club date single engagement field." *Carroll* v. *American Federation of Musicians,* 241 F.Supp. 865, 891 (S.D.N.Y. 1965).

"Plaintiffs claim that they represent a class of orchestra leaders largely engaged in the single engagement field who (a) are employers who regularly employ sidemen or employee musicians who are members of AFM, Local 802, or another Local affiliated with AFM; and (b) are independent contractors largely engaged in the single engagement field." 241 F.Supp. at 884.

In areas other than the club date field, the subjects of the by-laws and regulations were largely dealt with in collective bargaining agreements between the AFM and employers. Thus, for example, where AFM had a collective bargaining agreement with the three television networks, that agreement determined the minimum wage union sideman would be paid by the networks. 241 F.Supp. at 873. Consequently, AFM did not unilaterally impose minimum wage requirements upon orchestra leaders as it did in the club-date field which lacked collective bargaining agreements.

There were no collective bargaining agreements in the club date music industry because of the peculiar nature of the diverse employers who employed club date musicians sporadically, sometimes only once in a lifetime and generally for non-commercial purposes, *e.g.* the father of the bride. This is a truly unique situation since the "primary purpose" of a union is to "bargain collectively with their employers for its members". Statement of Senator Cummins during the Senate debate with respect to Section 6 of the Clayton Act, quoted in *Cordova* v. *Bache & Co.*, 321 F.Supp. 600, 612 (S.D.N.Y. 1970). This should be contrasted with the case at bar where the employers (theatrical producers) have formed associations for the sole purpose of negotiating collective bargaining agreements with Equity. Thus, unlike AFM, Equity has collective bargaining agreements with all producers who employ its members.

The uniqueness and the peculiar facts of *Carroll* have not escaped the attention of commentators [6] or the courts. In

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[6] *E.g.*, Bartosic, *The Supreme Court, 1974 Term*, 62 Va. L. Rev. 533, 593, n. 270 (1976); *Labor Law-Antitrust Liability of Labor Unions*, 15 B.C. Ind. Comm. L. Rev. 595, 606 (1974) ("it has been suggested that the holding in *Carroll* may be limited to the special employment conditions of the music industry"); DiCola, *Labor Antitrust: Pennington, Jewel Tea and Subsequent Meandering*, 33 U. Pitt. L. Rev. 705, 747 (1972); Leslie, *Principles of Labor Antitrust*, 66 Va. L. Rev. 1183, 1216, n. 113 (1980) ("The holding in *Carroll* appears to have been at least partially dependent on the peculiar nature of the club-date music industry, . . . but it is a disturbing precedent nonetheless.").

Home Box Office, Inc. v. *Directors Guild of America, Inc.*, 83 F.R.D. 423, 425 (S.D.N.Y. 1979), the court, commenting upon defendants' reliance upon *Carroll,* noted:

> "But *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 . . . (1968), cannot confidently be read so broadly, given its special circumstances, especially the fact that the orchestra leaders there actually played as musicians with their dance bands. Furthermore, this Court, at least, lacks the confidence to apply a decision as unique and difficult as *Carroll* without the benefit of a full record, as Judge Levet insisted on having in *Carroll* itself."

At best, *Carroll* dealt only tangentially with the issue of union regulation of agents. In *Carroll,* the four plaintiffs were orchestra leaders and musicians who were members of AFM while competing with and hiring union member-musicians. Two of the four *Carroll* plaintiffs were also agents, but only to the limited extent that they booked jobs for their own orchestras. Accordingly, the primary issue and the focus in *Carroll* was plaintiffs' activities as orchestra leaders (and not as booking agents) and the union's fixing the minimum prices ("price floors") the orchestra leaders could charge their customers. This is demonstrated by the Supreme Court's delineation of the issues in *Carroll*:

> "The question is whether union practices of the petitioners *affecting orchestra leaders* violate the Sherman Act as activities in combination with a 'non-labor' group, or are exempted by the Norris-LaGuardia Act as activities affecting a 'labor' group which is a party to a 'labor dispute'. " 391 U.S. at 101 (emphasis supplied).
>
> "The critical inquiry is whether the price floors in actuality operate to protect the wages [of union members]." 391 U.S. at 108.

In its opinion below, the Court of Appeals recognized that "the central holding" in *Carroll* "was that the fact that bandleaders sometimes performed as musicians meant that such [union] restrictions were valid. . . ." 622 F.2d at 650 [J.A. 344].

Despite the peripheral involvement of agents in *Carroll,* that decision has been indiscriminately extended to cases [7] which involved full time professional independent agents, a factual situation never considered in *Carroll.*

In *Carroll* the Supreme Court approved the District Court's holding that the orchestra leader plaintiffs were parties to a "labor dispute" and were a "labor group" because of the "presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors." 391 U.S. at 106. The District Court in *Carroll* held that the plaintiffs, *as orchestra leaders,* were members of the AFM's labor group because:

> "[T]he plaintiff orchestra leaders are in competition with employee members of the defendant unions regarding jobs, wages and other working conditions. As a result they comprise a labor group in these fields." 241 F.Supp. at 887-88.

Here the Agents are clearly not in competition with their Union member-clients regarding jobs, wages or other working conditions. Accordingly, the express basis upon which the *Carroll* plaintiffs were found to be a part of the AFM labor group is wholly absent here. The District Court went on to hold that the two *Carroll* plaintiffs who performed as booking agents *were not, in that capacity, part of the AFM's labor group:*

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[7] *See, e.g., Adams, Ray & Rosenberg* v. *William Morris Agency,* 411 F.Supp. 403 (C.D. Cal. 1976); and *Redfield* v. *American Federation of Musicians,* No. 78-7530 (2d Cir. Mar. 1, 1979).

> "Since their expulsion from the defendant unions, Carroll and Peterson have not personally led or played at their engagements. *They merely book and organize them. In this capacity they do not compete with sidemen or subleaders and the basis of the conclusion that they are a labor group falls.*" 241 F.Supp. at 890 (emphasis supplied).

Although the impact of AFM's licensing of agents, other than as it applied incidentally to plaintiffs as orchestra leaders, was not before the Court,[8] the District Court proceeded to rule on this subject. The District Court, recognizing that the "economic interrelationship" between booking agents (who are independent businessmen who obtain jobs for union members) and union members was a novel area, stated:

> "Booking agents are independent contractors not in job or direct wage competition with members of the defendant unions. Apparently, no court has had to decide the question of whether a group of independent contractors performing different functions than a union's members and not in competition with union members for jobs may be subjected to union regulations consistent with the antitrust laws." (241 F.Supp. at 892),

and then concluded:

> "Because the activities of the booking agents *here* have and had a direct and substantial effect on the wages of the members of defendants, I find that they are in an economic interrelationship with the members of defendants such that the defendants are

[8] In *Carroll*, unlike the case at bar, the plaintiffs were *not* boycotted by the union in their capacity as booking agents (but were as orchestra leaders and musicians). 391 U.S. at 103, fn. 5.

> justified in regulating their activities without contravening the Sherman Act. *Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale wages and working conditions.*" 241 F.Supp. at 893 (emphasis supplied).

The conclusions that there was an "economic interrelationship" between the members of AFM and its booking agents and that there was a reasonable relationship between the licensing of agents and AFM's "interest in maintaining observance of union scale wages and working conditions" were predicated upon the following findings of fact, *none of which are present in the instant case:*

1. In *Carroll* the AFM did not have a collective bargaining agreement with the employers (*e.g.*, the father of the bride) who hired its members. Accordingly, if AFM were to enforce its unilaterally imposed minimum wage scales, it had to do so through its members and through direct vertical regulation of the booking agents who pay union members. Here, where the Union has entered into collective bargaining agreements with the employers (producers) who directly pay Union members, there is no such need or justification.

2. In *Carroll,* where there was no collective bargaining agreement between the union and the employers, this Court held that AFM's fixing the minimum prices which orchestra leaders could charge was justified by a specific "finding that the requirement is necessary to assure that scale wages will be paid to the sidemen and the leader." 391 U.S. at 112.

> "There was evidence that when the leader does not collect from the purchaser of the music [employer] an amount sufficient to make up the total of his

> out-of-pocket expenses, including the sum of his wage-scale wages and the scale wages of the sidemen, he will, in fact, not pay the sidemen the prescribed scale." *Id.* at 111.

In stark contrast, the Courts below could not, and indeed did not, find that Union members were not paid scale wages or were in danger of not being paid scale wages. There was undisputed evidence that:

> A. Producers must pay scale wages to Union members pursuant to collective bargaining agreements between the Union and producers [Pl. Ex. 106, R. 43 (p. 162)];
>
> B. Producers must post a bond guaranteeing the payment of scale wages to Union members [Pl. Ex. 114, R. 44 (p. 380)]; and
>
> C. Unlike *Carroll,* where the employer paid the booking agents who in turn paid the Union members, *here the producers pay the actors directly.* [J.A. 150-151]. Despite Union allegations that actors need protection from their agents, *there is no evidence that any Union member who used an agent was ever paid less than scale or minimum.*

In view of the above, the District Court's finding that "the regulations imposed by Actors' Equity upon its members are without doubt designed to protect union wage scales" (478 F.Supp. at 502) [Pet. App. B 7] is without substantiation and is clearly erroneous.

3. In *Carroll* there was a specific finding:

> "that the booking agent regulations were adopted because of experience that 'many booking agents [A] charged exorbitant fees to members and [B] booked engagements for musicians at wages which were below union scale'." 391 U.S. at 113.

Again for the reasons noted in "2" above, the Courts below did not find that the petitioners or other agents "booked engagements for" Union members "at wages which were below union scale". Similarly, the Courts below did not find that "many" theatrical agents (or even one) "charged exorbitant fees to" Union members[9] because there is no evidence that:

> A. Any petitioner or any other agent charged an exorbitant commission[10] to any Union member or anyone else; or
>
> B. Any Agent charged a Union member a commission in excess of the 10% commission permitted by Article 11 of the General Business Law.

Because of the above, the Court of Appeals holding that the regulation of theatrical agents is justified by the "*possibility* that job-hungry actors will work through agents who take excessive commissions" (622 F.2d at 651) [J.A. 348-49] (emphasis supplied) can only be characterized as unsubstantiated and speculative and, therefore, is clearly erroneous.

4. In *Carroll* there was no evidence that the booking agents were licensed or regulated by any government

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[9] The Second Circuit in *Redfield* v. *American Federation of Musicians*, No. 78-7530 (Mar. 1, 1979), was faced with a case identical to *Carroll* except that the plaintiff booking agent was not a member of the AFM. The Court justified its application of *Carroll* to *Redfield* by holding:

> "the purpose of the restrictions is aimed at protecting the musicians from booking agents who may charge exorbitant fees or contract for work at lower than going rates."

For the reasons noted above, the Union's restrictions here cannot be justified on the grounds that they are necessary to protect Union members from agents who charge "exorbitant fees" or contract for work at "lower than going rates".

[10] Since the booking agents were allowed to charge 15% commissions in *Carroll* (241F.Supp. at 881), by using the term "exorbitant" the Court was obviously referring to commissions in excess of 15%.

agency. Here, the agents all operate in New York City and, as the District Court found, they are:

> "... required to be licensed as employment agencies and are regulated by the Department of Consumer Affairs of New York City pursuant to article 11 of the General Business Law of the State of New York, which sets the maximum commissions employment agencies may charge and has specific provisions dealing with theatrical agents." 478 F.Supp. at 497 [Pet. App. B 2].

Accordingly, the District Court's holding in *Carroll* as to the licensing of booking agents by AFM and the booking agents' "economic interrelationships" with AFM was based upon facts which are not present in this case. Those facts established a legitimate labor objective or justification for the AFM's regulation of booking agents—*i.e.,* the protection of musician's scale wages in the absence of a collective bargaining agreement which normally supplies such protection. The conclusion by the Court of Appeals here that theatrical agents "must be considered a 'labor group' because the union cannot eliminate wage competition among its members without regulation of the fees of the agents." (622 F.2d at 651) [J.A. 348], totally ignores the effect of the lack of a collective bargaining agreement in *Carroll.* Moreover, this conclusion is not substantiated by the record. There is no evidence that absent its franchising system Equity would be unable to "eliminate wage competition among its members."

The District Court in *Carroll* did not define what it meant by an "economic interrelationship"[11] between a union

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[11] The narrowness of the term "economic interrelationship" is best illustrated by *Los Angeles Meat and Provision Drivers Union* v. *United States,* 371 U.S. 94 (1962), the Supreme Court decision which first used that term in the phrase *"any actual or potential wage or job competition, or of any other economic interrelationship,*

and another group. However, such a relationship obviously cannot include those numerous groups of persons who merely supply products and services to union members but do not affect the actors' wages, hours or working conditions, such as: landlords who charge rent, actors' studios which charge fees, photographers who charge fees, grocery stores who sell food, transportation companies which take actors to their destination, accountants and lawyers who charge fees, or agents who charge fees. If it were otherwise, unions would be permitted to fix the prices and regulate the activities of the foregoing groups (of which *only* the agents' fees are regulated by the state) with immunity from the antitrust laws simply because their activities affect actors' disposable income.

In responding to this argument, the District Court held:

> "Unlike theatre ticket prices, photographers' fees, commuting costs, or grocery prices, commissions are directly and proportionately related to wages." 478 F.Supp. at 504 [Pet. App. B. 9].

Petitioners submit that the commissions an actor pays an agent cannot be distinguished from the other expenses an actor incurs which affect his disposable income on the ground that "commissions are directly and proportionately related to wages." A factor which significantly affects the

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between the grease peddlers and the other members of the union." *Id.* at 98 (emphasis supplied). In that case it was held that "grease peddlers", independent businessmen who purchased restaurant grease and then sold and delivered the grease to processors, were *not* in a wage or job competition or other economic interrelationship with the members of a union composed of processors' employees who picked up the grease at restaurants and then delivered it to the processors. If, in the Supreme Court's view, the grease peddlers who performed the same functions as Union members were not in an economic interrelationship with the Union members, the agents here are clearly not in an economic interrelationship with the members of Equity. *See also United States* v. *Fish Smokers Trade Council,* 183 F.Supp. 227 (S.D.N.Y. 1960).

amount of an actor's wages and is directly related to such wages is the price a producer charges for admission to his play because the more money a producer grosses the more he will be able to pay his actors. Nevertheless, neither an actor nor his union can, under the antitrust laws, regulate the producer's ticket prices. In *United Mine Workers of America* v. *Pennington,* 381 U.S. 657, 663 (1965), the Supreme Court stated:

> "If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not succesfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement."

The significance of a collective bargaining agreement to the determination of a union's labor exemption from the antitrust laws is highlighted by a comparison of this Court's decisions in *Carroll* and *Pennington.* In *Pennington,* where the parties had a collective bargaining agreement, the Court, as noted above, indicated that a union's efforts to protect its members' wage scales by setting the price employers charged their customers would violate the antitrust laws. On the other hand, in *Carroll,* where there was no collective bargaining agreement, the Supreme Court specifically held that the union could fix the minimum prices orchestra leaders charge their customers so as to protect its members' wage scales without violating the antitrust laws.

This significance is also demonstrated by this Court's decision in *Connell* and the recent opinion of the Ninth Circuit in *California State Council of Carpenters* v. *Associ-*

ated General Contractors of California, Inc., 1980-81 Trade Cas. (CCH) ¶ 63,663 (1980). In the latter opinion the Court of Appeals noted that:

> "*Connell* held that a union could be liable under the antitrust laws for coercing a 'stranger' employer, i. e., *one with whom the union had no collective bargaining relationship,* to agree not to use nonunion subcontractors" (*id.* at 77,555) (emphasis supplied),

and went on to hold that the statutory exemption did not apply to defendants who sought to coerce general contractors and others

> ". . . with whom the Union had *no collective bargaining relationship,* to hire only construction firms, primarily subcontractors, who had not signed with the Unions" (*id.* at 77,556) (emphasis supplied).

See also Larry V. Muko, Inc. v. *Southwestern Pennsylvania Building and Construction Trades Council,* 609 F.2d 1368, 1373 (3rd Cir. 1979). These cases stand for the proposition that unions which attempt to impose restraints upon persons who do not employ union members (and therefore never have collective bargaining agreements with such unions) are not protected by the nonstatutory exemption.

We have dealt at some length with the District Court opinion in *Carroll* because the long majority opinion of this Court in *Carroll* devotes only one paragraph to the AFM's regulation of booking agents. 391 U.S. at 113. In that paragraph the majority refers to "Oliver II"[12] and adopts with favor the District Court's factual justification (*i.e.*, finding of a legitimate labor objective) for the AFM's regulation of booking agents—to wit, booking agents (operating in the absence of a collective bargaining

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[12] *Teamsters Union* v. *Oliver,* 362 U.S. 605 (1960).

agreement and state regulation) charged exorbitant fees and booked jobs at less than the scale wages unilaterally mandated by the AFM. As previously noted, these factual findings are totally inapplicable to the case at bar where Equity members' scale wages are set by a collective bargaining agreement, Equity members receive their wages directly from the producers (and then pay commissions to an agent, if appropriate), and agents' commissions are regulated by state law. Under these circumstances, no legitimate labor objective is furthered by Equity's regulation of theatrical agents.

B. If This Court Interprets *Carroll* To Hold That Theatrical Agents Are Part of Equity's Labor Group—*Carroll* as Applied to Agents Should Be Overruled.

No one can dispute the existence of a "delicate and difficult area of conflict"[13] between our federal antitrust laws which foster competition and our federal labor laws which limit competition. Similarly indisputable is the fact that this Court and other "Courts have struggled for decades to resolve the clash between the procompetitive purposes of the antitrust laws and the anticompetitive impact of the labor laws." *Consolidated Express: Antitrust Liability for Illegal Labor Activities,* 80 Columbia Law Review 644 (April 1980). In *Jou-Jou Designs Inc.* v. *ILGWU,* 490 F.Supp. 1376, 1382 (S.D.N.Y. 1980), the Court recently noted:

> "We are thus confronted, as many courts have been, with the interaction of antitrust policy and labor policy, expressed in statutes and Supreme Court decisions. The accommodation between these policies, characterized by one commentator as 'intrinsically incompatible,' presents 'a troublesome and unruly

[13] Dissenting opinion of Justice White in *Carroll,* 391 U.S. at 114.

> issue.' *Commerce Tankers* v. *National Maritime Union of America,* 553 F.2d 793, 801 (2d Cir. 1977), quoting Meltzer, *Labor Unions, Collective Bargaining and the Antitrust Laws,* 32 U. Chi. L. Rev. 659 (1965)."

Labor's statutory exemption from the antitrust laws reflects Congress' desire to reconcile the clash between conflicting federal antitrust and labor policies (*Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797, 806 (1945)) while limiting the statutory exemption to unilateral union activity which strengthens a union's ability to bargain collectively. As the Court in *Associated General Contractors, supra,* at 77,557, held:

> "The statutory exemptions from the antitrust laws found in the Clayton and Norris-LaGuardia Acts were, however, 'designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining'. *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana Railroad,* 353 U.S. 30, 40, 77 S.Ct. 635, 640 (1957). *See, also, Cordova* v. *Bache & Co.,* 321 F.Supp. 600, 605-06 (S.D.N.Y. 1970)."

See also Larry V. Muko, Inc. v. *Southwestern Pennsylvania Building and Construction Trades Council,* 1978-2 Trade Cas. (CCH) ¶ 62,184 at 75,295 (3d Cir. 1978), where the Court held that the "statutory exemption" expresses "a national labor policy in favor of the freedom of employees to organize." In *Carroll* this Court tipped the delicate balance between the conflicting labor and antitrust policies in favor of labor by extending the definition of a labor group to include persons such as booking agents who were not in a job or wage competition with union members. Prior to *Carroll,* no Court had ever held that persons

who are not union members, who do not compete with union members for jobs and who perform different functions from union members—are nevertheless part of a union labor group. *See* the District Court decision in *Carroll,* 241 F.Supp. at 892. Petitioners submit that this Court in *Carroll* extended the definition of a labor group solely because there was no collective bargaining agreement to protect minimum wages of union members and that, were it not for the economic interrelationship between wages and booking agents which exists only in the absence of a collective bargaining agreement (and state regulation of agents), *Carroll* would have been differently decided.

If this Court, nevertheless, disagrees with petitioners' contention that *Carroll* was intended to be limited to its particular facts,[14] it should overrule *Carroll* because union regulation of agents, at least in the presence of collective bargaining agreements and state regulation of agents, does not further any legitimate labor objective. For the reasons previously noted, theatrical agents such as petitioners have no impact upon the minimum wages paid to Union members which are covered in comprehensive collective bargaining agreements between the Union and bonded producers. If the decisions below are allowed to stand, the delicate balance between conflicting federal labor and antitrust policies will be upset without benefitting labor while at the same time retarding the important antitrust policy of free competition which is the foundation of this Court's decisions that group boycotts, price fixing and agreements not to compete are illegal *per se. See*

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[14] In his dissent in *Carroll,* Justice White stated:

> "It may be that the Court views this industry as having special problems of supply and demand requiring special treatment under the antitrust laws. If this is the case, the Court should frankly say so and seek to confine the misguided rules of law it announces." 391 U.S. at 121.

Radiant Burners, Inc. v. *Peoples Gas Light & Coke Co., supra; Albrecht* v. *Herald Co., supra; Goldfarb* v. *Virginia State Bar, supra; Interstate Circuit, Inc.* v. *United States, supra; Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1 (1958).

In this regard, it should be noted that in most cases involving conflicts between federal labor and antitrust policies the courts are concerned with the "congressional policy favoring collective bargaining" (*see, e.g., Connell* at 626; *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.,* 381 U.S. 676 (1965)), a concern which is not present here. If Equity is precluded from franchising agents, its collective bargaining agreements with producers will not be affected, the wages and working conditions of its members will not be affected, and the policies of economic freedom which support the antitrust laws will be furthered.

POINT II

There is No Justification for the Union's Prohibition of Commissions on Scale Jobs.

If this Court were to affirm that portion of the opinions below which justify the "regulation of the fees of agents" on the ground that "the union cannot eliminate wage competition among its members without" such regulation (622 F.2d at 651) [J.A. 348], it should nevertheless hold that the regulation of maximum fees does not permit unions to require agents to render their services to union members for nothing on scale or minimum or any other jobs. No citation is required for the proposition that the power to tax is the power to destroy. Agents are forced to work for nothing when they obtain a scale job for a client even

though they sought a higher wage for the client in negotiations with the producer. In view of agents' self-interest in obtaining the highest possible wages for actor-clients, there can be no justification for the Union's prohibition of commissions on scale jobs.

Despite the above language of the Court of Appeals, there is no evidence to support a finding that a prohibition of commissions on scale jobs, as opposed to Union regulation of maximum commissions, helps the Union "eliminate wage competition among its members" or furthers any other legitimate labor objective.

Moreover, agents' commissions are regulated by Article 11 of the General Business Law and there is no evidence that agents collect commissions which violate Article 11. Accordingly, no justification has been shown to substitute the Union's desire to impose onerous and self-serving restrictions on agents' commission for the wisdom of the New York State Legislature in permitting theatrical agents to charge a ten percent commission under Article 11 of the General Business Law.

If the Courts below are upheld, the Union might, and could lawfully the day after this Court's decision, require agents to work for no commission on jobs which pay $1000 a week or more. Where, as here, agents are forced to work for nothing, the Union is not furthering a legitimate labor objective but instead is requiring agents to subsidize Union members.

POINT III

There Is No Justification for the Union's Requirement That Franchised Agents Must Pay Franchise Fees for the Privilege of Being Regulated and Dominated by Equity.

Not content with regulating the commissions that agents charge Union members and with regulating the manner in which agents may operate their businesses, the Union requires agents to pay franchise fees for the privilege of being regulated, dominated and required to work for nothing. *No court, not even Carroll, prior to the decisions of the Courts below, has ever held that a union may extract franchise fees from independent agents who represent union members.* In *Carroll,* the Union did not extract franchise fees from the agents it regulated. 241 F.Supp. at 881.

The Court of Appeals, while recognizing that franchise fees is a "troublesome" area, appears to have assumed without explanation that the Union may impose upon agents the "union's expenses in administering the franchise system" it forces upon unwilling agents. 622 F.2d at 651 [J.A. 349-50].

Although the Court of Appeals found that "no evidence was presented at trial to show that the union's costs justified the franchise fees" and that:

> "Clearly the union could not, legally, exact more from the agents than it needs to offset the costs of the franchising system. Such exactions would be unconnected with any of the goals of national labor policy[15] which justify the antitrust exemption for labor" (*id.*),

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[15] The Court of Appeals previously stated:

"The goal of the agent restrictions is the elimination of wage competition, traditionally one of the most sacrosanct goals of national labor policy." 622 F.2d at 651 [J.A. 349].

However, the Court of Appeals did not explain how the Union requirement that agents pay franchise fees in any way assists the Union in eliminating wage competition amongst its members.

it nevertheless refused to reverse the District Court on this issue because of assumptions which are not supported by the record.

Judge Motley did not cite any evidence or reasoning to support her "opinion that the franchise fees are reasonably related to the operation of the franchise system and the system's protection of wage scales and working conditions." 478 F.Supp. at 504 [Pet. App. B9]. The Union's requirement that agents must pay a franchise fee in order to represent actor-members of the Union on the Union's terms and conditions does not constitute protection of wage scales —but again amounts to the agents' forced subsidization of Union members. The more franchise fees extracted from agents, the less dues Union members must pay to Equity. If Equity (like the AFM in *Carroll*) did not charge any franchise fees, the wage scales Equity negotiates with producers for the benefits of Equity's members would remain unchanged. In short, the Union's requirement that agents pay franchise fees to the Union is an illustration of the Union's extension of its legal monopoly power over Union members to illegally extract fees from independent agents. *See United States* v. *Griffith, supra; Packaged Programs, Inc.* v. *Westinghouse Broadcast Co., supra.*

Conclusion

Petitioners request that the decisions of the Courts below be reversed and that this Court: (1) hold that theatrical agents are not part of Equity's labor group (or in any event that the franchise fee and no commission on scale job provisions of Equity's franchising system are not protected by the statutory labor exemption), (2) rule on the issue of whether the Equity franchising regulations (if not protected by the statutory exemption) are illegal *per se* and

not protected by the nonstatutory exemption,[16] and (3) remand this case to the District Court for the issuance of appropriate injunctive relief. Although the Courts below did not reach issue (2), "it was fully aired before the District Court" and "it involves the application of settled legal principles to uncontroversial facts." Accordingly, this Court has discretion to decide this issue *de novo* without remanding the case to the District Court for rulings thereon. *New York City Transit Authority* v. *Beazer,* 440 U.S. 568, 583 (1978).

Dated: New York, New York
December 31, 1980

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[16] Little argument is required to establish that: (1) Equity's activities, *i.e.*, price fixing, group boycott, agreement not to compete, are illegal *per se* absent the statutory exemption (*see* the cases cited at pages 10 and 11 above, and *Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797 (1945)); (2) the nonstatutory exemption does not apply here. As stated by the Court of Appeals in *Associated General Contractors, supra,* at 77,560:

> "It is apparent from the discussion in *Connell* that the nonstatutory exemption may be invoked only in cases involving agreements between unions and employers on wages or working conditions."

No. 80-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

H.A. ARTISTS & ASSOCIATES, INC., S.T.E. REPRESENTATION LTD., J. MICHAEL BLOOM, LTD., DON BUCHWALD & ASSOCIATES, INC., MARJE FIELDS, INC., HENDERSON/HOGAN AGENCY, INC., OPPENHEIM-CHRISTIE ASSOCIATES LTD., JOEL PITT LTD., TALENT REPRESENTATIVES INC., D.M.I. TALENT ASSOCIATES, LTD., JEAN THOMAS AGENCY, INC., BOB WATERS AGENCY, INC., JACOBSON-WILDER, INC., WILLIAM D. CUNNINGHAM & ASSOCIATES, INC., TRANUM ROBERTSON & HUGHES, INC., MONTY SILVER AGENCY LTD., BRET ADAMS LIMITED, MICHAEL THOMAS AGENCY, INC., LESTER LEWIS ASSOCIATES, INC., LEAVERTON ASSOCIATES LTD., JOE JORDAN TALENT AGENCY INC., RAGLYN-SHAMSKY, LTD., ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

—against—

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

BRIEF FOR RESPONDENTS

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Counterstatement of Question Presented

Whether the Court of Appeals correctly concluded that a union's longstanding agent regulations, instituted and maintained to preserve union wage scale and standards and protect union members in their dealings with agents who effectively control access to employment, are protected by the labor exemption to the antitrust laws established by the Clayton Act of 1914, 15 U.S.C. § 17, 29 U.S.C. § 52, and the Norris-LaGuardia Act of 1932, 29 U.S.C. §§ 101-115.

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In the

Supreme Court of the United States

October Term, 1980

No. 80-348

H.A. Artists & Associates, Inc., S.T.E. Representation Ltd., J. Michael Bloom, Ltd., Don Buchwald & Associates, Inc., Marje Fields, Inc., Henderson/Hogan Agency, Inc., Oppenheim-Christie Associates Ltd., Joel Pitt Ltd., Talent Representatives Inc., D.M.I. Talent Associates, Ltd., Jean Thomas Agency, Inc., Bob Waters Agency, Inc., Jacobson-Wilder, Inc., William D. Cunningham & Associates, Inc., Tranum Robertson & Hughes, Inc., Monty Silver Agency Ltd., Bret Adams Limited, Michael Thomas Agency, Inc., Lester Lewis Associates, Inc., Leaverton Associates Ltd., Joe Jordan Talent Agency Inc., Raglyn-Shamsky, Ltd., Ann Wright Representatives Inc.,

Petitioners,

—against—

Actors' Equity Association, an unincorporated association, and Donald Grody,

Respondents.

BRIEF FOR RESPONDENTS

Statement of the Case

A. *Introduction*

This case involves the fifty-year old agent regulations promulgated and maintained by respondent Actors' Equity Association ("Equity") for the protection of its members in their dealings with theatrical agents who stand between actors and jobs in a manner vitally affecting actors' access

to employment and the terms and conditions thereof. Equity's agent regulations were determined by both courts below to be protected by the statutory labor exemption to the antitrust laws. 622 F.2d 647 (2d Cir. 1980) [J.A. 332]; 478 F. Supp. 497 (S.D.N.Y. 1979) [Pet. App. B1].[1]

B. *Statement of Facts*

Equity has represented actors working in the legitimate theatre since the early part of this century. It is a national union which seeks to improve the wages and working conditions of stage actors by securing collective bargaining agreements with producers throughout the United States. Equity's collective bargaining agreements prescribe minimum wages and other terms and conditions of employment, while permitting the individual actor to bargain for terms exceeding minimum.[2]

Early on, it became apparent to Equity that protection of its members in their terms and conditions of employment required regulation of theatrical agents in the business of obtaining jobs for actors and negotiating individual terms with producers in return for a cut of the actor's wages. The historic scarcity of jobs and high unemployment in the legitimate theater rendered actors acutely vulnerable to exploitation by theatrical agents who effectively controlled access to jobs. Such vulnerability was (and remains) particularly great for actors without an

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[1] "J.A." refers to the Joint Appendix. ("Pet. App.") refers to petitioners' appendix to the Petition for Certiorari. "R" refers to the record. References to pages in Pet. App. denominated *"(continued)"* will appear in the following form: *e.g.*, "Pet. App. B1(c)-B2."

[2] The minimum or "scale" wage varies, depending upon the type of production. As of August 1977, the minimum weekly salary for Broadway shows—the most desirable and difficult placement for actors in the legitimate theatre—was $355.00; Off-Broadway it was $175.00 per week [J.A. 221].

established reputation who comprise the overwhelming majority of Equity's membership. Abuses by such agents, including the extraction of high commissions which undermined union scale, prompted Equity in 1928 unilaterally to promulgate regulations designed to protect its members in their dealings with agents. The regulations prohibited Equity members from dealing with agents who would not agree to represent them in accordance with Equity-prescribed conditions, including ceilings on the commissions which could be charged. Equity members were permitted to deal only with agents who indicated their willingness to conform to standards designed to protect Equity's members, by obtaining a permit from Equity. Members who dealt with nonlicensed agents were subject to union discipline [J.A. 49].[3]

The circumstances necessitating Equity's promulgation of agent regulations in 1928 have remained essentially unchanged. The vast majority of Equity's membership is at any given time unemployed, and agents continue effectively to control access to scarce job opportunities. "As a matter of general industry practice, producers seek actors and actresses for their productions through agents. Testimony in this case convincingly established that an

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[3] In upholding the regulations in 1929, the Second Circuit, per Swan, J., noted that the "evils of unregulated [theatrical agents]" were "set forth in defendants' affidavits and . . . corroborated by common knowledge." *Edelstein* v. *Gillmore,* 35 F.2d 723, 726 (2d Cir. 1929), *cert. denied,* 280 U.S. 607 (1930). Among the evils described in those affidavits were excessive commissions (in contravention of New York statutory limits on commissions); long-term contracts imposing obligations and restrictions on the actor without any corresponding obligations on the agent; and other breaches of the fiduciary relationship between agent and actor. *See also* A. Harding, Revolt of the Actors (1929) [J.A. 291-331]. The potential for worker abuse by private employment agencies is well documented. *See Ribnik* v. *McBride,* 277 U.S. 350, 359 (1928) (Stone, Holmes, & Brandeis, JJ., dissenting); *Adams* v. *Tanner,* 244 U.S. 590, 597, 600 ff. (1917) (Brandeis, J., dissenting)

actor without an agent does not have the same opportunity to be taken seriously as an actor who has an agent." 478 F. Supp. at 497 [Pet. App. B2(c)-B3].[4]

The essential elements of Equity's agency regulations have similarly remained unchanged since 1928. [J.A. 49-50][5] Equity members are prohibited on pain of union

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[4] "Even principal interviews, in which producers are required to interview all actors who want to be considered for principal roles, do not eliminate the need for an agent, who may have a greater chance of gaining an audience for his client." 478 F. Supp. at 497 [Pet. App. B2(c)-B3]. Principal interviews give the actor a chance to talk to a producer representative for a minute or two, but no opportunity "to audition", *i.e.*, read for the role. It is at the audition, not the principal interview, where the actor has the opportunity actually to display his acting ability. The actor who relies on principal interviews is far less likely to be called for an audition than the actor who is referred by an agent [J.A. 155-161, 129, 144-145, 147-149].

[5] The agent regulations have undergone revisions in some details over the years, as a result of input from Equity's membership and from agents through theatrical Artists Representatives Associates ("TARA"), which until shortly before this litigation was the only association voicing the concerns of agents relating to their representation of Equity members. Many of the petitioners were, until their voluntary resignation in late 1977, members of TARA. [J.A. 60] TARA functions only in the legitimate theatre field. The National Association of Talent Representatives, to which petitioners now belong, functions also in the field of motion pictures and television, where agents, including petitioners, operate under analogous agent regulations maintained by the Screen Actors' Guild and the American Federation of Television and Radio Artists. [J.A. 74]

Each agency which belonged to TARA had one vote, regardless of size, and all TARA members who wished to participate in discussions with Equity were welcome to do so. [R. 43 (pp. 330, 353)]. While an agent from William Morris, a large agency, served as TARA's secretary, TARA's president was a small agent and petitioner agents held the offices of treasurer and vice-president. [R. 43 (pp. 240-241, 242, 328-329)] The parties stipulated that membership in TARA is not a precondition of being licensed by Equity. [J.A. 50]. The District Court found that petitioners did not "demonstrate[ ] that Actors Equity's regulation of agents was either applied in a discriminatory fashion favoring TARA agents or was designed to operate for the advantage of TARA agents," 478 F.2d at 503 [Pet. App. B8(c)].

discipline from using agents who have not, through the mechanism of obtaining an Equity license, agreed to comply with a set of union-promulgated rules designed for members' protection. 478 F. Supp. at 497 [Pet. App. B2(c)-B3]. The union's restrictions on commissions provide, in essence, that actors' earnings are commissionable at ten percent of the entire amount of salary so long as it does not result in the actor receiving less than minimum wage negotiated by Equity. 478 F. Supp. at 498 [Pet. App. B3(c)-B4].

Commissions in this industry are not necessarily related to effort by the agent. Agents often function as little more than "order takers." Merely answering a producer's telephone call can result in collecting ten percent of an actor's weekly salary for as long as the show runs [J.A. 167]. Similarly, agents can collect commissions on salaries of actors they represent even if the actor obtains the job without the agent [J.A. 168-169, 149-150]. In representing less established actors, agents hope to develop relationships which will become continually more remunerative as the actor's reputation grows and he can demand higher salaries. Agents select those actors whom they believe to have the potential for success. No agent is required to represent any actor the agent does not wish to represent.

In addition to establishing ceilings on commissions, Equity's regulations seek to insure that agents fulfill the fiduciary obligations inherent in the agency relationship, and are designed to protect the actor from locking himself into unreasonable exclusive agreements because of his vulnerability to anyone who offers the promise of employment [J.A. 249-260, 273-275]. Equity limits the duration of exclusive agreements and provides that the actor be permitted to withdraw from such arrangement if the agent

has been unable to secure employment for the actor within prescribed time periods, or upon the departure from the agency of the persons on whom the actor specifically relied in signing with the agency. Because the agents take a percentage of clients' salaries regardless of the extent of involvement in obtaining the work, they have an incentive to sign on as many actors as possible irrespective of capability of servicing them. Equity's regulations provide the actor with relief from unreasonably long, unproductive exclusive arrangements, while leaving agents free to develop long-term relationships with actors they in fact assist [J.A. 119-120].[5a]

The agent regulations constitute, in short, "a union's effort to regulate parties, who, because of industry structure," control access to opportunities and, "stand athwart the current of wages paid by employers to union members," 622 F.2d at 650 [J.A. 347].

Summary of Argument

Equity's longstanding regulation of agents for the purpose of promoting fair access to jobs and upholding union wage scales and standards is protected by the statutory exemption from the antitrust laws created by the Clayton

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[5a] Equity's agent regulations have largely but not completely remedied the abuses which prompted them. The proverbial "casting couch" has not been eliminated [J.A. 163], nor has agent pressure for commissions exceeding ten percent of wages [J.A. 161-162]. Agents have unfairly excluded actors from competition by falsely assuring them that they would be submitted for particular roles when, in fact, favored actors were referred instead. [J.A. 206]. Agents have collected commissions from actors notwithstanding conflicts of interest, e.g., while functioning as "packagers" [J.A. 131-132] or as casting director for the producer [J.A. 136-137].

and Norris-LaGuardia Acts. As interpreted in *United States* v. *Hutcheson,* 312 U.S. 219 (1941) and *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 (1968), the labor exemption shields a union's efforts to protect its members by regulating employment agents who are engaged in the sale of members' labor. In a labor system where agents are necessary for access to jobs, a union furthers its traditional goal of eliminating wage and job competition by insuring that its members do not compete for agents' services in a manner that undermines union wage scales and standards. The purpose and effect of union activity in this case is restricted to such labor market concerns. In *Carroll,* essentially identical union regulation of commissions and representation activity of booking agents was held antitrust exempt, and petitioners have advanced no justification for overruling *Carroll.*

Equity's agent regulations are protected by the *Hutcheson* exemption for unions acting in their self-interest and not in combination with nonlabor groups. Equity's members are plainly engaged in a "labor dispute," within the ambit of the Clayton and Norris-LaGuardia Acts, with agents such as petitioners who arrange and negotiate terms and conditions of employment. Equity furthers its central purpose as a union representing its members in the sale of their labor by protecting them in their dealings with agents who perform complementary functions in the labor market. No conspiracy or combination with employer groups or with one agent group to disadvantage another is involved in this case. Equity's requirements benefit only union members, exclude no agent complying with them, and are implemented solely through the concerted action of members.

Carroll establishes that permissible union interest and action within the *Hutcheson* exemption encompass not only

situations where the entrepreneurs are doing union members' work, but also "economic interrelationship[s] affecting legitimate union interests between the union members and the independent contractors." 391 U.S. at 106. Here, as in *Carroll,* the union regulates agent commissions and representation activity of agents in order to ensure fair dealings and maintenance of minimum standards in the performance of agents' job placement and bargaining functions. These functions, frequently performed exclusively by unions in non-entertainment industries, plainly place the agents in an economic interrelationship with Equity members affecting legitimate union interests.

No authority exists for denying the labor exemption to Equity's agent regulations. There is no suggestion that Equity regulates agents for any purpose other than the protection of its membership. Nor is there any danger in this case of an anticompetitive business conspiracy which the union assists in the hope of sharing supracompetitive profits as higher wages. *Compare Allen Bradley* v. *Electrical Workers,* 325 U.S. 797 (1945), and its progeny. Equity's members would derive no benefit from conferring monopoly power on particular agents or groups of agents. Indeed, Equity has every interest in encouraging vigorous competition among agents. Its sole concern is that competition not take place in a manner compelling members to absorb wage cuts in the form of commissions invading minimum wage scale or subjecting them to unfair practices.

Petitioners' attempts to sidestep the controlling force of *Carroll* are without merit. None of the purported distinctions raised by petitioners withstands analysis, as is shown in detail below. In sum, petitioners offer no justification for overruling a statutory precedent, which has engendered sparse litigation, has been applied without difficulty in the lower courts and is fully consistent with labor-antitrust jurisprudence.

ARGUMENT

Equity's Longstanding Regulation of Agents for the Purpose of Promoting Fair Access to Jobs and Upholding Union Wage Scale and Standards Is Protected by the Statutory Labor Exemption, as Developed in *Hutcheson* and *Carroll*.

A. Equity's Regulations Fall Squarely Within the *Hutcheson* Exemption for a Union Acting in Its Self-Interest and Not in Combination With Nonlabor Groups.

In *United States* v. *Hutcheson*, 312 U.S. 219 (1941), this Court held that under Sections 6 and 20 of the Clayton Act of 1914, 15 U.S.C. §17, 29 U.S.C. §52, and the Norris-LaGuardia Act of 1932, 29 U.S.C. §§101-115, labor unions acting in their self interest and not in combination with nonlabor groups enjoy a broad statutory exemption from Sherman Act scrutiny and liability. Distilling a history of congressional reaction to restrictive judicial interpretation of the proper sphere of union activity and concern, Justice Frankfurter's opinion for the Court declared:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under §20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232 (footnote omitted).

The labor exemption under *Hutcheson* derives from the Norris-LaGuardia Act, particularly the definition of "labor dispute" in Section 13, 29 U.S.C. §113, in which Congress "reasserted the original purpose of the Clayton Act by

infusing into it the immunized trade union activities as redefined by the later Act," *Hutcheson, supra,* at 236. Equity's members and agents such as petitioners are "engaged in the same industry . . . or have direct or indirect interests therein." In view of the agents' functions in securing employment and bargaining on behalf of Equity members, this is a "controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. §113. Under *Hutcheson,* no federal injunction may issue and "§20 [of the Clayton Act] removes all such allowable conduct from the taint of being a 'violation of any law of the United States,' including the Sherman Law." 312 U.S. at 236.

The premise of *Hutcheson* is that the antitrust laws have only a limited application to labor unions as such, and that Congress in the Norris-LaGuardia Act broadened the definition of "labor dispute" to ensure that a union is shielded from the Sherman Act when it seeks to improve the wages and working conditions of its members through the elimination or regulation of competition in the labor market. *See also Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 503-504 (1940); *Hunt* v. *Crumboch,* 325 U.S. 821 (1945). In sum, in the Clayton and Norris-LaGuardia Acts, Congress rendered the Sherman Act "generally inapplicable to union efforts to achieve, to maintain, or to exploit monopoly in the labor market." Meltzer, Labor Unions, Collective Bargaining and the Antitrust Laws, 32 U.Chi. L. Rev. 659, 669 (1965).

A union forfeits its exemption under *Hutcheson,* however, when it combines with businessmen to help establish

a business monopoly. Thus, in *Allen Bradley* v. *Electrical Workers,* 325 U.S. 797 (1945), the Court held that a union violates the Sherman Act when it combines with manufacturers and contractors in erecting a sheltered local business market in order "to bar all other businessmen from [the market], and to charge the public prices above a competitive level." *Id.* at 809. As the business groups in that case had formed a conspiracy independently violative of the Sherman Act, "[a] business monopoly [was] no less such because a union participate[d], and such participation [was] a violation of the Act." *Id.* at 811.[6]

Application of the reasoning of *Hutcheson* and *Allen Bradley* to the facts of the instant case makes clear that Equity's longstanding agent regulations, instituted and maintained for the purpose of protecting union members from overreaching by agents and of safeguarding the union's minimum wage scale and other labor standards, are shielded by the statutory exemption.

In this case, Equity is simply advancing the economic interests of its members by protecting them from agents who, because of the structure of the legitimate theatre industry, control access to jobs and represent actors with respect to wages and other terms of employment. Agents perform functions— representing members with respect to the sale of their labor—that in non-entertainment industries are performed exclusively by unions. Agents' operations directly affect work opportunities and the integrity of union minimum scale and other standards. The com-

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[6] In *Hunt* v. *Crumboch, supra,* decided the same day, the Court ruled that the labor exemption protected a union's boycott of a truck hauler through successful secondary pressure on purchasers of its services with whom the union had contracts, because of the absence of union participation in a conspiracy with the hauler's competitors. *See* 325 U.S. at 824; *Meltzer, supra,* at 677 & n.74.

missions they seek directly and inevitably reduce the wages union members will receive. The union's representation of members with regard to the sale of their labor necessarily requires consideration of the complementary role of agents; its regulation of agents operates solely to the immediate and direct benefit of members; and it furthers its aim by a concerted refusal of members to patronize agents wo do not comply with union requirements.

This case comes to the Court without any element of conspiracy or combination with employer groups, or with one agent group to disadvantage another. After a full trial, the District Court found "no evidence to suggest the existence of any conspiracy or illegal combination between Actors' Equity and TARA or between Actors' Equity and producers," 478 F. Supp. at 499 [Pet. App. B4(c)-B5], and that petitioners had "not demonstrated that Actors' Equity regulation of agents was either applied in a discriminatory fashion favoring TARA agents or was designed to operate to the advantage of TARA agents." *Id.* at 503 [Pet. App. B8(c)]. These findings were not disturbed on appeal and are not challenged here.[7] All agents are restricted in the same manner by the union; none who comply with Equity's regulations are excluded from the opportunity to compete to represent union members. Moreover, Equity has no incentive to create a sheltered market for any agent or group of agents by eliminating competitors, and has every incentive to maximize competition

[7] Despite a faint intimation in petitioners' brief (Pet. Br. 3, n. 2), no meaningful distinction can be drawn between TARA members and petitioners. See p. 4, n. 5, *supra*. Even with respect to scale jobs, while William Morris did not frequently represent scale performers, neither did the only petitioner to testify [J.A. 112-115a]. As noted in petitioners' brief (Pet. Br. 8-9), TARA vigorously opposed Equity's prohibition of commission on minimum scale.

among agents. Thus, this case presents neither an actual nor a potential *Allen Bradley* situation and in this respect is distinguishable from every case in modern times in which the Court has denied the labor exemption to union activity.[8]

B. Under *Carroll*, Equity Did Not Combine With a Nonlabor Group in Regulating the Agents' Control Over Access to Employment and Impact on Wages and Other Labor Standards.

Petitioners contend that Equity's system for protecting its members in the job market falls outside of the statutory exemption because of an "agreement" with a "nonlabor group" in the form of union licensing of employment agents. This contention was squarely rejected in *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1968), involving another entertainment union's regulation of booking agents.

Petitioners' central argument in this case seems to be that Equity may not seek to regulate the commissions charged or other aspects of the representation of their members by agents despite the immediate impact of agent practices on job opportunities, wages and working conditions, because agents are neither in wage or job competition with actors nor employers with whom the union has collective bargaining agreements (see Pet. Br. 18, 26, 34 & n. 16). This is an attempt to return to the era preceding

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[8] See pp. 24-27, *infra*. In cases where union agreements with nonlabor groups present potential *Allen Bradley* situations, in that they may have the effect of sheltering signatory businesses from competition in product markets, the Court has recognized a nonstatutory exemption to shield agreements that are intimately related to wages, hours and working conditions. *See, e.g., Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965).

the Norris-LaGuardia Act, which was enacted in response to judicial limitation of the proper sphere of labor conflict and concern[9] and "established that the allowable area of union activity was not to be restricted . . . to an immediate employer-employee relation." *United States* v. *Hutcheson,* 312 U.S. at 231. Petitioners seek to bypass not only *Carroll* but also *New Negro Alliance* v. *Grocery Co.,* 303 U.S. 552 (1938), involving a civil rights group's picketing in protest of the discriminatory employment practices of a firm with whom neither the group nor its members sought employment, and several pre-*Carroll* cases upholding union regulation of the practices of independent entrepreneurs having an impact on the wages and working conditions of members, see *Milk Wagon Drivers' Union* v. *Lake Valley Co.,* 311 U.S. 91 (1940); *Teamsters Union* v. *Oliver,* 358 U.S. 283 (1959) (*"Oliver I"*); *Teamsters Union* v. *Oliver,* 362 U.S. 605 (1960) (*"Oliver II"*).

Milk Wagon Drivers and the *Oliver* rulings make clear that a union's campaign to maintain labor standards may extend to independent businessmen who seek to do the same work as union members. In *Milk Wagon Drivers,* the Court held that a union of milk drivers was engaged in a "labor dispute" within the meaning of the Norris-LaGuardia Act when it sought to organize independent "vendors" who supplied milk to retail stores. "Whether rightly or wrongly," Justice Black noted, "the defendant union believed that the 'vendor system' was a scheme or device utilized for the purpose of escaping the payment of union wages and the assumption of working conditions commensurate with those imposed under union standards." 311 U.S. at 98-99. The Court in *Oliver I* invoked *Milk Wagon*

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[9] *See, e.g., Duplex Co.* v. *Deering,* 254 U.S. 443 (1921); *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn.,* 274 U.S. 37 (1927).

Drivers to hold lawful a union's successful campaign to prescribe through collective bargaining agreements the minimum rental independent owner-operators could charge when leasing their vehicles to carriers. Application of state antitrust laws was rejected because the "objective [was] to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs." *Id.* at 293-294. The Court reasoned that "the point of the Article [was] obviously not price fixing but wages. The regulations embod[ied] . . . a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract." *Id.* at 294.[10]

Carroll establishes that permissible union interest and action within the ambit of the labor exemption encompass not only situations where the entrepreneur is doing union members' work but also other "economic interrelationship[s] affecting legitimate union interests between the union members and the independent contractors." 391 U.S. at 106. Two different categories of union regulations were considered in *Carroll.* The first involved price floors and other restrictions imposed on orchestra leaders who dealt with the purchasers of the music. Justice Brennan's opinion for the Court held that the price floors were not subject

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[10] On remand, the state court interpreted *Oliver I* as inapplicable to independents in the capacity of "lessor-owner and employer of drivers of his equipment," and thus continued to enjoin enforcement of the union-carrier requirement that hired or leased equipment, if not owner-driver, be operated only by employees of certificated carriers and that carriers use their own available equipment before leasing extra equipment from the independents. In *Oliver II,* the Court's *per curiam* decision stated that "these provisions are at least as intimately bound up with the subject of wages as the minimum rental provisions" passed on in *Oliver I.* 362 U.S. at 606.

to the Sherman Act whether or not there was job competition between orchestra leader and employee-musician. See 391 U.S. at 106-112.[11] The second type of regulation at issue in *Carroll* restricted the commissions and booking activity of booking agents and caterers who were not involved in wage or job competition with union members. The Court held that such restrictions "'are *at least* as intimately bound up with the subject of wages,' *Oliver II, supra,* at 606, as the price floors." 391 U.S. at 113 (emphasis supplied).

The union's restrictions on agent commissions and booking activity presented a far less difficult issue for the *Carroll* Court than the price floors imposed on orchestra leaders, the minimum price scale for independent owner-operators in *Oliver I,* or the union's organizing of "vendors" in *Milk Wagon Drivers.* The booking agent restrictions were "at least as intimately bound up with the subject of wages" as the price floors imposed on the orchestra leaders, because the former did not involve union control of the prices to be charged the ultimate purchaser of the union members' services, and there was no danger that the immediate beneficiary of the union-set "price" would be the booking agents rather than the workers themselves. Here, as in *Carroll,* the restrictions are concerned exclusively with protecting job opportunities and wages. Equity's "regulations embody a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure" *Oliver I, supra,* at 294, and to undermine fairness and regularity in the process of obtaining work in this industry.

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[11] Even when the leader did not perform or displace an employee-musician, price-cutting by leaders might lead to "skimping" on the wages paid to musicians. 391 U.S. at 111-112.

In *Carroll*, District Judge Levet held that the American Federation of Musicians ("AFM")'s licensing of booking agents and fixing of maximum commissions were entitled to the statutory exemption under *Hutcheson*. 241 F. Supp. 865, 892-893 (S.D.N.Y. 1965). He noted that the union instituted this system to eliminate agent practices "which undermined the musicians' wage structure," *id.* at 892.[12] A parallel to the legitimate theatre field was explicitly drawn: "Apparently, similar abuses by booking agents existed in other fields, too. *Edelstein* v. *Gillmore*, 35 F.2d 723, 726 (2d Cir. 1929) (actors)." He rejected the contention that the AFM could not regulate the commissions and other practices of the booking agents because they were "independent contractors performing different functions than a union's members and not in competition with union members for jobs," 241 F.Supp. at 892. In the absence of wage or job competition, the booking agents were a "labor group" because of the presence of an "economic interrelationship affecting legitimate union interests between union members and the independent contractors," 241 F.Supp. at 887.[13] Drawing support from Section 13 of the Norris-

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[12] Petitioners mischaracterize the AFM regulations by asserting that they were concerned only with "exorbitant commissions" (Pet. Br. 22, n. 10). The AFM licensing agreement introduced as an exhibit at the *Carroll* trial bars any agent commission or compensation which has "the effect, directly or indirectly, [of] reduc[ing] the net compensation or pay of any member for his services to less than the minimum scale of pay provided by the Federation or its Locals." [J.A. 285; 74-75]. Moreover, while petitioners note that booking agents in *Carroll* were allowed to charge 15% maximum commissions, they fail to point out that New York then as now permitted up to 20% commissions for orchestra bookings in opera and concert fields. New York General Business Law, Section 185, par. 8. [Pet. App. G-7].

[13] The District Court cited *Los Angeles Meat and Provision Drivers Union* v. *United States*, 371 U.S. 94, 98, 103 (1962); *id.* at 104 (Goldberg, J., concurring). *See* 241 F.Supp. at 892. Con-

LaGuardia Act,[14] Judge Levet in *Carroll* concluded that a union could regulate the activities of the booking agents because they "have and had a direct and substantial effect on the wages of the members," and the regulations were "reasonably related to [the union's] interest in maintaining observance of union scale wages and working conditions." *Id.* at 893.[15]

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trary to petitioners' characterization (Pet. Br. 23, n. 11), the "grease peddlers" in *Meat Drivers conceded* that they were not in wage or job competition or other economic interrelationship with the other members of the union. *See* 371 U.S. at 101. Justice Goldberg's opinion explained that the peddlers could not be members of the union, "not because there is absent the job or wage competition erroneously considered critical by the District Court, but because there does not appear in the record any other legitimate labor union interest presently being served by organization of these peddlers." *Id.* at 104-105 (Goldberg, J., concurring).

Both *Meat Drivers* and *United States* v. *Fish Smokers Trade Council, Inc.*, 183 F. Supp. 227 (S.D.N.Y. 1960), involved combinations of independent businessmen organized as "sham" labor unions. Petitioners do not suggest that either Equity's actors or the AFM's musicians in *Carroll* constituted such a "sham" labor group. Equity is "a labor union and its spur to action related to wages and working conditions." *Allen Bradley, supra,* 325 U.S. at 807, n. 12.

[14] Judge Levet stated:

> This definition of a labor dispute is the source of the test of actual competition or other economic interrelationship between independent contractors and union members for determining whether the former is a labor group that the union may regulate. *Los Angeles Meat Drivers etc.* v. *United States, supra; Milk Wagon Drivers Union etc.* v. *Lake Valley Farm Prods., Inc., supra.*

241 F. Supp. at 893.

[15] Judge Levet employed a similar analysis to uphold the union rule *prohibiting* booking activities by caterers who were "also independent contractors not in job or wage competition with union members, [but] in a unique position to affect the choice of orchestras by purchasers of music and the wages and working conditions of musicians." 241 F. Supp. at 893. This ruling was also affirmed. 391 U.S. at 113-114.

This Court sustained Judge Levet's definition of a "labor group," see 391 U.S. at 106, and affirmed his ruling that the union's regulation of booking agents was exempt from the antitrust laws:

> We think also that the caterer and booking agent restrictions "are at least as intimately bound up with the subject of wages," *Oliver II*, *supra*, at 606, as the price floors [which the AFM imposed on orchestra leaders]. The District Court found that the booking agent regulations were adopted because of experience that "many booking agents charged exorbitant fees to members and booked engagements for musicians at wages which were below union scale." 241 F. Supp., at 881-882. On the basis of these findings, the District Court concluded:
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> "Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of [the unions], I find that they are in an economic interrelationship with the members . . . such that the [unions] are justified in regulating their activities . . . . Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale wages and working conditions." 241 F.Supp., at 893.

391 U.S. at 113. The *Carroll* Court directed the Second Circuit "to enter a judgment affirming the judgment of the District Court in its entirety." *Id.* at 114.[16]

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[16] Petitioners' suggestion that *Carroll's* application of the labor exemption to union regulation of booking agents (and caterers) is dictum borders on the frivolous. The antitrust implications of the booking agent restrictions was an issue tried (including testimony by eight full-time booking agents) and passed on by the trial court and briefed and adjudicated in this Court. *See* Appendix, *American Fed. of Musicians* v. *Carroll*, Nos. 309-310, O.T. 1967, pp. 108-111, 113 (pre-trial order); Cross-Petition for Writ of Certiorari,

The parallel between the facts of this case and the situation regarding the booking agents in *Carroll* is inescapable. As Judge Levet's reference to *Edelstein* v. *Gillmore, supra,* makes clear, Equity's agency regulation also have their genesis in abuses by agents who stand between actors and scarce employment opportunities.[17] In the legitimate theatre field, as in the instrumental music field, talent agents have a direct and substantial impact on the wages and working conditions of the employee. Theatrical agents affect not only the conditions under which the actor will work, but whether he will work at all.

Milk Valley Drivers, Oliver and *Carroll* demonstrate that a union's regulation of job and wage competition in the labor market—whether among its members or between members and third parties functioning in that market—falls squarely within the labor exemption. In labor systems where agents stand between union members and jobs, the exemption protects a union's effort to improve the lot of union members through regulation of the agents' functions in the labor market. In this case, as in *Carroll,* Equity regulates job and wage competition among its members by insisting that such competition take place in a manner ensuring compliance with union standards of fairness and regularity. As the Court of Appeals observed in this case, "[i]n industries where it is necessary or customary for

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No. 310, (O.T. 1966), pp. 2-3, 6 (questions presented: Nos. 1, 2, 4, 20); Brief for the American Fed. of Musicians, Nos. 309-310, pp. 15-16, 67-69; Cross-Petitioners (Plaintiffs') Brief, Nos. 309-310, pp. 27-28, 94-96.

[17] Petitioners mistakenly suggest (Pet. Br. 21-22) that under *Carroll* a union may not regulate agent commissions absent findings that agents charge exorbitant commissions at the time of litigation. The references in *Carroll* were to past abuses, and Judge Levet's opinion acknowledges that "[t]he objective of the [AFM] was the elimination of the practices which undermined the musicians' wage structure and the regulations adopted were successful." 241 F.Supp. at 892; *id.* at 882 (Finding No. 119).

union members to secure employment through agents," a "union cannot eliminate wage competition among its members without regulation of the fees of the agents." 622 F.2d at 650-651 [J.A. 347-348]. Similar reasoning applies to the other aspects of Equity's protective scheme, from its provision of relief from unreasonable exclusive arrangements with agents to the requirement that union members not be subject to personal indignities in the search for jobs.

Agents perform two basic functions for actors in the legitimate theatre which in non-entertainment industries are performed by unions: placing actors in jobs and negotiating wages and other terms of employment. Equity's agent regulations represent a union's longstanding effort to regulate the performance of such functions, in effect, as a substitute for maintaining a hiring hall and serving as the exclusive bargaining representative of its members for all terms of employment.

In several industries, notably construction, longshore and maritime, unions traditionally have maintained hiring halls and other job referral systems to protect workers from exploitation where work is typically temporary and intermittent in nature and is performed on separate project sites rather than fixed locations. As Senator Taft explained in 1947: "The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall." S.Rep. No. 1827, 81st Cong., 2d Sess. 13 (1947). The National Labor Relations Board and the courts have ruled that union demands for hiring halls are a mandatory subject of collective bargaining, and strikes to obtain such provisions are lawful, protected activity. *See, e.g., Houston Chapter, Assoc. General Contractors,* 143

NLRB 409 (1963), *enforced,* 349 F.2d 449 (5th Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966); *NLRB* v. *Tom Joyce Floors Inc.,* 353 F.2d 768, 771 (9th Cir. 1965).

A common feature of casual labor markets is the potential for exploitation and abuse of participants hunting for jobs in such markets. By maintaining hiring halls, unions strive to eliminate abuses (such as kick-backs) and ensure fairness and regularity in the system of access to employment. Because of the particular characteristics and history of the legitimate theatre industry, independent businessmen—theatrical agents—arrange employment for actors. The agent regulations are designed to advance the protective goals furthered by the union hiring hall in other contexts.[18]

No principle of American labor law is more firmly established than the right of the duly authorized representative of workers in a unit to insist on exclusive representation with respect to wages, hours, and working conditions. See *J.I. Case Co.* v. *NLRB,* 321 U.S. 332 (1944); *Emporium Capwell Co.* v. *Community Org.,* 420 U.S. 50 (1975). *J.I. Case* acknowledges that "where there is great variation in circumstances of employment or capacity of employees, it is possible for the collective bargain to prescribe only minimum rates or maximum hours or expressly to leave certain areas open to individual bargaining." 321 U.S. at 338. That Equity has chosen to follow such a course does

[18] The regulations prescribe the duration of actors' contracts with agents, including provision for terminating contracts where agents are unable to obtain work for the actor over a period of time. Agents functioning in a dual capacity for actor and producer threaten to undermine a fiduciary obligation to the actor which his union may act to uphold. Restrictions on commissions is a form of regulation of the cost of obtaining work, which in other contexts is accomplished through union hiring halls or referral systems. Equity's attempt to protect its members from the abuses of the functional equivalent of a nonunion hiring hall is union activity in bona fide pursuit of traditional labor objectives.

not alter the fact that agents like petitioners are performing a function which the collective bargaining representative could choose to, and in most industries does, perform. Certainly the statutory exemption protects a union's efforts to regulate the conduct of union business agents in performing the bargaining function. To expose Equity to Sherman Act liability for regulating the conduct of third persons performing essentially the same function is to create an incentive to eliminate the flexibility offered by present arrangements. It is precisely because Sherman Act adjudication tended to thwart the achievement of such traditional union objectives in the labor market that the Clayton and Norris-LaGuardia legislation created an exemption for union activity in pursuit of those objectives.

Equity has not occupied the field in either the hiring or bargaining areas; it has permitted agents to function in both, on condition that they observe minimum standards of fairness in dealings with members and do not undermine the union-negotiated minimum wage and working conditions. As *Carroll's* holding with respect to booking agents illustrates, a union acts in its legitimate self-interest and is engaged in a "labor dispute" under Norris-LaGuardia when it seeks to regulate wage or job competition among members whose employment is arranged through agents, and to ensure that the agents' performance of traditional union functions conforms to union standards.

Petitioners claim that agents in this industry are indistinguishable from "numerous other groups of persons who merely supply products and services to union members," such as landlords, grocers, accountants and lawyers (Pet. Br. 24). The findings of both courts below, which petitioners do not dispute, make clear that agents differ from these groups in two respects: control of access to jobs and negotiation of terms of employment. For the

actor, agent commissions are not a discretionary expenditure of "disposable income," but are incurred as an inevitable concomitant of obtaining employment. The amount an actor receives in wages is, as the District Court below noted, "directly and proportionately related" to the amount that goes to the agent in commissions. 478 F.Supp. at 504 [Pet. App. B9(c)]. Equity's members are plainly engaged in a "labor dispute" under Section 13 with petitioner agents "concerning the representation of persons . . . in seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." 29 U.S.C. §113. Petitioners' argument simply ignores Congress' judgment that a union's legitimate interests may extend beyond the immediate employer-employee context, and its intent to ensure "that the [Act's] limitations . . . not be whittled away by refined definitions of what persons are to be regarded as legitimately involved in labor disputes . . ." H. Rep. No. 669, 72d Cong., 1st Sess. 11 (1932).

C. No Authority Exists for Denying the Labor Exemption to Equity's Agent Regulations Which Involve a Union's Effort to Improve Job Opportunities and Wages for Its Members, and Pose No Danger of Sheltered Competition in Product Markets.

Whatever the label affixed to the agents—whether they are deemed part of a "labor group," held to be in an "economic interrelationship" with Equity's members, or characterized as a "nonlabor group"—no authority exists for denying the labor exemption to Equity's agent regulations, which are maintained solely to benefit union members and are implemented and enforced through internal discipline of union members.[19] None of the concerns which have

[19] Even the licensing of agents is a formality. Equity accomplishes the same result whether it simply instructs its members to

prompted the Court to engage in close scrutiny of "combinations" or "agreements" with nonlabor groups are implicated in this case.

In every decision by this Court denying the labor exemption on grounds of impermissible combination with a nonlabor group, the Court has been concerned with restraints of the kind that business interests seeking to inhibit product market competition might undertake in the absence of the union. From *United States* v. *Brims*, 272 U.S. 549 (1926), cited by *Hutcheson* to illustrate union action in combination with a nonlabor group,[20] through the Court's recent decision in *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters*, 421 U.S. 616 (1975), the impetus for judicial scrutiny has been the actuality of or significant potential for restraints on competition in the product market of the sort that businessmen in that market might undertake on their own.[21] And in every case, union members could

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deal only with agents who abide by specified standards, or whether it instructs them to deal only with agents who are formally licensed.

[20] The *Hutcheson* Court characterized *Brims* as "involving a conspiracy of mill work manufacturers, building contractors, and union carpenters." 312 U.S. at 232, n. 3. In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 501 (1940), the Court described *Brims* as a "case of a labor organization being used by combinations of those engaged in an industry as the means or instrument for suppressing competition or fixing prices."

[21] In *Allen Bradley, supra*, the Court found that the union was aiding and abetting a business conspiracy to create a monopoly in the electrical equipment market. 325 U.S. at 798-801. The monopoly achieved, both prices and wages soared. *Id.* at 800.

The Court was careful to point out, however, that it was not simply the union's *agreement* with employers which created a combination with a nonlabor group falling outside the *Hutcheson* exemption:

> It is true that victory of the union in its disputes, even had the union acted alone, might have added to the cost of goods, or might have resulted in individual refusals of all of their

be seen to benefit from the monopoly objectives of employers or other restraint on product market competition. In essence, the Court has denied the labor exemption in cases where "benefits to organized labor [are] utilized as a cat's paw to pull [businessmen's] chestnuts out of the

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employers to buy electrical equipment not made by Local No. 3. So far as the union might have achieved this result acting alone, it would have been the natural consequence of labor union activities exempted by the Clayton Act from the coverage of the Sherman Act.

325 U.S. at 809.

In *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965), the union agreed with one group of employers to impose a certain wage scale on employers in other bargaining units, even though this might force some employers in the latter group to shut down their operations. The Court viewed the union's conduct as potentially creating a sheltered market: "One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy." *Id.* at 665-666. Justice Douglas, concurring, stressed the fact that "high wages and welfare terms of employment were imposed on the small, marginal companies by the union and the major companies with the knowledge and intent that small ones would be driven out of business." *Id.* at 675.

The concerns expressed in *Allen Bradley* and *Pennington* also moved the Court in *Connell,* where the union obtained agreements with general contractors which endowed it with the power to establish a sheltered market for unionized subcontractors seeking contracts with the general contractors. The agreements required the general contractors to subcontract only with firms which had collective bargaining agreements with the union, thus giving the union power to exclude from competition in the product market any subcontractor with which the union refused to sign an agreement:

> [I]f the union thought the interests of its members would be served by having fewer subcontractors compete for the available work, it could refuse to sign collective-bargaining agreements with marginal firms. Cf. *Mine Workers* v. *Pennington, supra.* Or, since Local 100 has a well-defined geographical jurisdiction, it could exclude "traveling" subcontractors by refusing to deal with them. Local 100 might thus be able to create a geographical enclave for local contractors, similar to the closed market in *Allen Bradley, supra.*

421 U.S. at 624-625.

antitrust fires." *United States* v. *Women's Sportswear Assn.*, 336 U.S. 460, 464 (1949).

There is here no comparable danger—actual or potential—of a conspiracy of businessmen to dampen or exclude competition to which the union lends assistance in the hope of sharing through higher wages in the fruits of a sheltered market. Unlike an *Allen Bradley* situation, Equity's members would not benefit from monopoly power in the hands of particular agents, since diminished competition among agents would not increase the profits to producers who employ actors and pay their wages. Nothing in the record, economic theory or common sense suggests that reducing competition among agents could benefit Equity's membership. To the contrary, Equity has every interest in maximizing the number of agents: the greater the number of agents, the better the quality of services rendered to members.[22] Equity's sole concern is that competition among agents not take place in a manner which compels its members to absorb wage cuts—in the form of excessive commissions or commissions invading minimum scale—or subjects them to unfair practices or indignities. In short, the instant case simply does not give rise to the concerns expressed in *Allen Bradley* and its progeny where unions entered into nonexempt combinations or agreements with nonlabor groups.

D. Petitioners' Attempts to Distinguish the Instant Case From *Carroll* Are Without Merit.

Petitioners seek to sidestep the controlling force of *Carroll* in a variety of ways, none of which withstands analysis or relates to considerations that properly govern availability of the statutory exemption.

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[22] Indeed, vigorous competition among agents could lead to the charging of commissions below Equity's ceilings.

First, petitioners argue that the plaintiffs in *Carroll* were not full-time professional booking agents. This factual premise is at the very least questionable.[23] Moreover, whatever their other concerns, the *Carroll* plaintiffs were also challenging the union's "regimentation of booking agents." *See, e.g.,* Cross Pet. for Writ of Certiorari, No. 310 (O.T. 1966), p. 6 (Question Presented No. 20). This Court rejected the challenge notwithstanding the absence of wage or job competition between union member and agent.[24]

Second, petitioners contend that the presence of collective bargaining agreements between Equity and producers deprives Equity of the labor exemption. This argument is totally irrelevant to, *inter alia,* union restrictions on agent commissions, a principal feature of the regulations at issue

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[23] This Court noted that plaintiffs Carroll and Peterson, though expelled from membership, were "still permitted to book engagements and hire musicians to play at them but [could not] appear with their orchestra either as conductors or instrumentalists." 391 U.S. at 103, n. 5.

Contrary to petitioners' suggestion (Pet. Br. 18-19), whether or not Carroll and Peterson were part of a "labor group" of performing orchestra leaders who could be compelled, in that capacity, to join the union, *see* 241 F. Supp. at 890, Judge Levet clearly held that independent businessmen functioning as booking agents constituted a "labor group" subject to the AFM's booking agent regulations, including its restrictions on commissions, *see id.* at 892-93.

[24] The lower courts have uniformly applied *Carroll* to regulation of full-time talent agents. *See Redfield* v. *American Fed. of Musicians,* No. 78-7530, 603 F.2d 214 (2d Cir. Mar. 1, 1979); *Garrett* v. *American Fed. of Musicians,* 98 L.R.R.M. 2078 (D.S.C. 1978); *Adams, Ray & Rosenberg* v. *William Morris Agency,* 411 F.Supp. 403 (C.D. Cal. 1976) (denying preliminary injunction). *Home Box Office, Inc.* v. *Directors Guild of America, Inc.,* 83 F.R.D. 423, 425 (S.D.N.Y. 1979), relied on by petitioners, simply expressed a reluctance to grant summary judgment and, in any event, involved a union's attempt to organize and bargain on behalf of independent free-lance directors, not restrictions on agent commissions or operations for the benefit of undisputed employees.

in *Carroll* and in the instant case.[25] As the Court of Appeals determined, full elimination of wage competition in this industry extends beyond collective bargaining agreements: "In industries where it is necessary or customary for union members to secure employment through agents . . . the union cannot eliminate wage competition among its members without regulation of the fees of the agents." 622 F.2d at 650-651 [J.A. 347-348]. Unregulated agent commissions would compel actors who are competing among themselves for work to absorb "wage cuts" in the form of whatever commissions agents will charge.

Moreover, petitioners misstate the facts of *Carroll*. Although collective bargaining agreements were not used in the club-date field, the AFM set the minimum terms and conditions—the functional equivalent of a collective agreement—upon which purchasers of music could obtain the services of union members, and these were policed by AFM business agents, see 241 F. Supp. at 878 (Finding No. 82). Booking agent commissions were also regulated outside of the club-date field, where the employers of musicians typically entered into traditional collective bargaining agreements.[26]

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[25] Petitioners suggest that the supposed absence of collective bargaining agreements in *Carroll* required the AFM "to enforce its unilaterally imposed minimum scales . . . through direct vertical regulation of the booking agents who pay union members" (Pet. Br. 20). Nothing in Judge Levet's opinion supports the contention that even in the club-date field booking agents were involved in paying wages to AFM members. More importantly, petitioners never explain how this detail is related to the AFM's regulation of booking agent commissions.

[26] These agreements were listed by Judge Levet, see 241 F. Supp. at 883-84, and the point was noted in this Court, see 391 U.S. at 104, n. 6.

The Court of Appeals explicitly observed that the booking agent restrictions also applied in the steady engagement field and non-club date engagements [which] "are ordinarily governed by col-

Petitioners also urge that state regulation of employment agents repeals by implication the labor exemption.[27] Without authority, petitioners offer the remarkable proposition that the existence of some state protective legislation can render nonexempt legitimate union activity otherwise within *Hutcheson*. Under that theory, identical union activity would be subject to the Sherman Act in New York and not in states without analogous legislation.[28]

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lective bargaining agreements concluded by the union and the 'purchaser' of music." 372 F.2d at 158. It noted:

> *Most engagements are secured through booking agents, who since 1936 have been regulated by the Federation and its local unions,* because during the depression booking agents took advantage of the job shortages in the music industry by charging exorbitant commissions. Under present union by-laws, union members are forbidden to accept engagements from booking agents not licensed by the union. *The licensing agreements limit the commissions of booking agents to 10% for steady engagements* and 15% for single engagements; and the agents must agree not to book non-union orchestras or musicians or to book orchestras for engagements at less than the union scale.

Id. at 159 (emphasis supplied). For Judge Levet's finding to the same effect, see 241 F.Supp. at 881.

[27] The AFM licensing agreement in *Carroll* clearly assumed the existence of state regulations by requiring the licensed agent to "comply with all the laws, ordinances, and requirements of the different localities applying to such agencies." [J.A. 281, 74-75].

[28] Equity is a national union and its agency regulations apply nationwide. Moreover, the New York law, even where it applies, fails to address areas of legitimate union concern. For example, Equity regulates the duration of exclusive management contracts between actor and agent and specifies the conditions under which an actor can gain release from such contracts (e.g., where the agent is not providing work within specified time limits; where particular sub-agents upon whom the actor relied have left the agency). These safeguards, essential to the protection of Equity's members, find no analogue in New York law.

Finally, as the experience leading to the regulations upheld in *Edelstein* v. *Gillmore, supra,* illustrates, see p. 3, *supra,* the ex-

Petitioners further attempt to avoid *Carroll* by referring to Equity's prohibition of commission on scale wages, a feature present in the AFM regulations (see p. 17, n. 12, *supra*) and, in any event, offering no principled basis for distinguishing *Carroll*.

Equity's regulations are designed to protect those actors without established reputations who are most dependent on agents for access to jobs and who will receive only the minimum wage prescribed by the collective agreement with the producers. The agents are in direct competition with such actors for the "wage pot" available for minimum scale compensation, and but for Equity's regulation, their commissions would directly invade the scale which is the irreducible minimum for employment in the industry. Preservation of a minimum wage in this industry, as the Court of Appeals recognized, "poses problems of particular intractability," 622 F.2d at 651 [J.A. 348], where engagements are often short-term, with substantial intervening periods of unemployment. Each time an actor is hired, irrespective of the length of the previous engagement, the agent charges a commission; the commission is not a one-shot expenditure as it may be in other industries. Under the labor exemption, actors may combine through their union to ensure that those with the least bargaining power will receive the minimum set in the collective agreement, and to increase the incentive for agents to try to obtain

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istence of a state statute does not guarantee adequate enforcement of its provisions. Indeed, the record here discloses that petitioners did not even comply with the law which they claim renders Equity's regulations unnecessary. For example, after they relinquished their Equity licenses and ceased using Equity's standard form contracts between actor and agent, almost none complied with the statutory requirement (see New York General Business Law, Sections 183, 185) that written contracts between actor and agent be provided to the actors and kept on file in the agency. [J.A. 116-119, 178, 181-182].

more than the minimum.[29] As long as Equity is acting free of combination with nonlabor groups in an area of bona-fide union concern, *Hutcheson* precludes judicial weighing of "the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness," 312 U.S. at 232, of its objectives.[30]

E. Petitioners' Invitation to Overrule *Carroll* Should Be Declined.

This Court should decline petitioners' invitation to overrule *Carroll*. "The doctrine of *stare decisis* imposes a severe burden on the litigant who asks [this Court] to disavow one of [its] precedents." *Thomas* v. *Washington Gas Light Co.*, —— U.S. ——, 100 S.Ct. 2647, 2656 (1980). Far from carrying that burden, petitioners offer no justifica-

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[29] As noted, the agent takes his commission out of the difference between actual salary and minimum, until the 10% maximum is reached. The agent's principal concern, moreover, is to develop ongoing relationships with actors who will command far more than scale.

The minimum wage in 1977 on Broadway—the premier placement for stage actors—was $355.00. With increasing inflation, the figure may someday be, as petitioners suggest (Pet. Br. 31), $1000 a week or more; what may constitute a minimum wage in this industry has no bearing on the availability of the statutory exemption.

[30] With respect to the licensing fees, both courts below found that the fees were reasonably related to Equity's costs in implementing the agent regulations. A factual finding by both courts below should not be disturbed in the absence of a showing of patent error, see *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 375 (1949)—a showing not even attempted here. These relatively nominal fees—averaging $60 a year (a total of $12,000 for all agents)—were not "incommensurate with Equity's expenses in maintaining a full-time employee to administer the system," 622 F.2d at 651 [J.A. 351], and represent in part the rendition of services to the agent, including arbitration in the event of disputes over the commissions due. As the Court of Appeals put it, these fees are not "exactions . . . unconnected with any of the goals of national labor policy which justify the antitrust exemption for labor." *Id.*

tion for asking this Court to overrule a statutory ruling, even though "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 736 (1977), citing *Edelman* v. *Jordan,* 415 U.S. 651, 671 (1974); *Burnet* v. *Coronado Oil & Gas Co.,* 285 U.S. 393, 406-08 (1932) (Brandeis, J., dissenting). *Carroll* was cited with approval in *Connell Construction Co.* v. *Plumbers & Steamfitters, supra* 421 U.S. at 622. Post-*Carroll* litigation has been sparse, with each decision faithful to this Court's resolution of the issue. The radiations of *Carroll* have not been felt beyond the entertainment industry context which gave rise to the need for union regulation of employment agents. The scholarly literature offers no criticism of the aspect of *Carroll* dealing with booking agents.[31] The *Carroll* decision is wholly consistent with labor-antitrust jurisprudence. Petitioners' sole recourse, if any, is to the national legislature.[32]

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[31] To the extent the commentators cited by petitioners [Pet. Br. 16, n.6] are critical of *Carroll,* their focus is the part of the Court's decision upholding the union's prescription of the minimum prices that even orchestra leaders who did not lead could charge purchasers of music. There is no similar danger in this case, however, that the beneficiary of the union-set "price" will be a business group, rather than the workers themselves. *Compare Carroll,* 391 U.S. at 117 (White, J., dissenting).

[32] The courts below did not reach a number of substantial issues. One such question is whether the injunction petitioners seek, unaccompanied by any request for declaratory relief, is beyond the equity jurisdiction of the federal courts by virtue of the Norris-LaGuardia Act. See *Milk Wagon Drivers' Union* v. *Lake Valley Co., supra,* 311 U.S. at 103; *Telegraphers* v. *Chicago & N.W.R. Co.,* 362 U.S. 330, 339 & n.15 (1960); *Connell Construction Co.* v. *Plumbers & Steamfitters, supra,* 421 U.S. at 637, n.19; *Utilities Ser. Eng.* v. *Colo. Bldg. & Constr. Trades,* 549 F.2d 173, 177-178 (10th Cir. 1977). Even if this case involved union participation in an independent business conspiracy of the type present in *Allen Bradley,* a federal injunction may reach only the combination and

not acts protected under the Clayton and Norris-LaGuardia Acts. *See Allen Bradley, supra,* 325 U.S. at 812.

In their conclusion (Pet. Br. 33-34), petitioners suggest that this Court should depart from its usual practice and address two other issues—the availability of the nonstatutory exemption and the applicability of a *per se* test—neither decided below nor "specifically brought forward by the petition," *General Talking Pictures Corp.* v. *Western Electric Co.,* 304 U.S. 175, 177 (1938); *compare New York Transit Authority* v. *Beazer,* 440 U.S. 568, 583, n.24 (1979) (issue decided below and carefully briefed in this Court; consideration of the issue might obviate a constitutional ruling).

In any event, petitioners are incorrect in their suggestion that the nonstatutory exemption is unavailable simply because the agents are not in a collective bargaining relationship with Equity, irrespective of the need of members for protection from agents or the reasonableness of the protective conditions fashioned in response. *Connell* does not support this harsh vision, in which the statutory exemption is denied because of the presence of collective agreements and the absence of job competition between actor and agent, and the nonstatutory exemption is withheld because agents are not the employers of actors. *Connell* addressed facts involving a potential *Allen Bradley* situation in which the union had obtained the power to exclude firms from the subcontracting market on grounds unrelated to wages, hours and working conditions. In the context of a combination with employer groups to exclude competitors in the same product market, there may be force to the Court's observation that a federal labor policy favoring collective bargaining was not implicated by an agreement unlawful under the National Labor Relations Act between a union and a general contractor with whom the union did not seek a bargaining relationship. But *Connell* did not purport to deal with all types of union agreements with nonlabor groups or with every conceivable justification grounded in federal labor policy that may be advanced for such agreements. Equity's agent regulations exclude only those unwilling to conform to the union's protective standards, and are at least as "intimately related to wages, hours and working conditions of union members" as the operating hours restriction held antitrust-exempt in *Meat Cutters* v. *Jewel Tea Co., supra,* 381 U.S. at 689.

Petitioners' further suggestion that Equity's regulations are *per se* invalid under the Sherman Act is unsupported. "[T]he Court [in *Jewel Tea*] intended that there be a full-scale rule of reason inquiry in every instance in which a nonexempt activity is claimed to be in violation of antirust." Handler, Labor and Antitrust: A Bit of History, 40 Antitrust L.J. 239-240 (1971). *See also*

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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DiCola, Labor Antitrust: *Pennington, Jewel Tea* and Subsequent Meandering, 33 U. Pitt. L. Rev. 705, 715 (1972); Comment, 80 Colum. L. Rev. 645, 662 (1980). In any event, irrespective of federal labor policy, the union activity in this case involves at most a concerted refusal to deal by actors, the consumers of the agents' services, and not a classic commercial boycott between competing "trader" groups. This Court's recent decisions make clear that "boycott" and "price-fixing" labels do not themselves identify the circumstances warranting *per se* treatment. *See St. Paul Inc. Co.* v. *Barry*, 438 U.S. 531, 542-543 & n.14 (1978); *Broadcast Music, Inc.* v. *CBS, Inc.*, 441 U.S. 1, 9 (1979); *see also Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Boycotts of the type involved in this case should be measured against the "rule of reason." *See generally* L. Sullivan, Antitrust §90, at 256 (1977) (classic boycott is "a concerted refusal aimed at depriving competitors of some needed resource and thus making it harder for them to compete"); *id.* at 262 (suggesting that a farm workers' consumer boycott of nonunion grapes is not *per se* violative of the Sherman Act); Coons, Non-commercial Purpose as a Sherman Act Defense, 56 Nw. U.L. Rev. 705 (1962).

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-348

H.A. ARTISTS & ASSOCIATES, INC.; S.T.E. REPRESENTATION LTD.; J. MICHAEL BLOOM, LTD.; DON BUCHWALD & ASSOCIATES, INC.; MARJE FIELDS, INC.; HENDERSON/HOGAN AGENCY INC.; OPPENHEIM-CHRISTIE ASSOCIATES LTD.; JOEL PITT LTD.; TALENT REPRESENTATIVES INC.; D.M.I. TALENT ASSOCIATES, LTD.; JEAN THOMAS AGENCY, INC.; BOB WATERS AGENCY, INC.; JACOBSON-WILDER INC.; WILLIAM D. CUNNINGHAM & ASSOCIATES, INC.; TRANUM ROBERTSON & HUGHES, INC.; MONTY SILVER AGENCY LTD.; BRET ADAMS, LIMITED; MICHAEL THOMAS AGENCY, INC.; LESTER LEWIS ASSOCIATES, INC.; LEAVERTON ASSOCIATES LTD.; JOE JORDAN TALENT AGENCY INC.; RAGLYN-SHAMSKY, LTD.; ANN WRIGHT REPRESENTATIVES INC.,

Petitioners,

against

ACTORS' EQUITY ASSOCIATION, an unincorporated association, and DONALD GRODY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

Introduction

Petitioners ("Agents") submit this brief in reply to various legal issues raised and incorrect or misleading statements made in the opposing briefs of respondents and their *amici curiae*[1] ("unions").

For the first time since the inception of this action in May, 1978, the unions in their briefs to this Court argue that: (1) respondents' conduct does not restrain trade or commerce under the Sherman Act because of the first sentence of section 6 of the Clayton Act which states that ,"The labor of a human being is not a commodity or article of commerce"; (2) even if the Agents are not part of a union labor group, they are nevertheless a party to a labor dispute. Petitioners contend that these new arguments are untimely and devoid of merit (Points I and II). In Point III, petitioners respond to the argument that the conduct of respondent Actors' Equity Association ("Equity") is protected by the nonstatutory exemption from the antitrust laws. In Point IV, petitioners demonstrate that the unions' rationales for the regulation of agents do not justify Equity's severe and pervasive restrictions of agents.

Before discussing the foregoing issues a few minor observations are in order. The unions continue to rely on *Edelstein* v. *Gillmore*, 35 F.2d 723 (2d Cir. 1929), *cert. denied*, 280 U.S. 607 (1930) (although the courts below did

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[1] The three opposing briefs will be referred to hereinafter as:

"Resp. Br." —Brief of respondents;

"AFL-CIO Br."—Brief of the American Federation of Labor and Congress of Industrial Organizations;

"Joint Br." —Brief of American Federation of Television and Radio Artists ("AFTRA"), Screen Actors Guild, Inc. ("SAG"), Writers Guild of America, West, Inc., and Writers Guild of America, East, Inc.

Petitioners' initial brief will be referred to hereinafter as "Pet. Br.".

not refer to this decision) as "upholding" the franchising regulations,[2] without advising the Court that plaintiff in *Edelstein* v. *Gillmore* challenged Equity's regulations on common law grounds of tortious interference rather than as violations of antitrust laws.

The unions' reliance on *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 358 U.S. 283 (1959), and *Local 24, International Brotherhood of Teamsters* v. *Oliver,* 362 U.S. 605 (1960), is misplaced. These cases involve labor disputes between unions and groups of individuals who perform the same functions as union members and compete with them for jobs.[3]

In its brief (Resp. Br. 6 n. 5a), Equity refers to alleged "abuses" by agents without advising this Court that:

1. Initially Equity asserted that its franchising regulations were necessary to protect actors from "exploitation and overreaching" by agents (June 14, 1978, affidavit of respondent Donald Grody, para. 7). At trial Equity totally reversed its position, asserted that the conduct of the Agents is "not an issue in this case" (R. 45 (pp. 655-56)) and invited the allegedly unscrupulous and incompetent agents to become refranchised and continue representing Equity's members (R. 44 (p. 532)).

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[2] Resp. Br. 2 n.3, 30 n.28. See also Joint Br. 4 ("Equity's regulations . . . received authoritative judicial approval"), 12-13, 23.

[3] *Oliver I* and *II* are further distinguishable on the ground that they did not involve the labor exemption to the federal antitrust laws. *Oliver I* and *II* precluded the applicability of Ohio's state antitrust laws to a collective bargaining agreement under the doctrine of federal preemption. Thus, the Supreme Court in *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616, 635 (1975), noted:

> "The [Supreme] Court has held repeatedly that federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the NLRA. *E.g.,* . . . *Teamsters* v. *Oliver,* 358 U.S. 283 (1959)."

2. The evidence of the alleged abuses was at best strained and minimal, especially in light of the fact that Equity has 23,000 members and nevertheless could not demonstrate any "abuses" beyond those few instances cited in footnote 5a. The quality of this evidence is demonstrated by the alleged "casting couch" practices which Equity contends have "not been eliminated". Equity cites only the testimony of one actress, Barbara Lea, to support this claim. While Equity refers to her testimony that a "notorious office chaser" actually chased her "around the office" (J.A. 163), Equity fails to note her testimony that this purported episode occurred in the mid-sixties, the "chaser" was unnamed, and he was dead at the time of trial and therefore could not rebut this charge of ancient misconduct (R. 45 (p. 759)).

The unions are correct in asserting that there are abuses and exploitation in actor-agent relationships. However, the unions fail to point out that most of the abuses are by actors who use their union's monopoly power and their own power to hire, fire, and exploit agents. Thus, as previously noted (Pet. Br. 6-7, 9), agents get no commissions for obtaining scale jobs for union members (which can pay in excess of $600 per week). Actors are paid directly by producers, and agents are forced to hope that the actors will then pay the agents the commissions they have earned.

Illustrative of overreaching by performers' unions and their members is the very recent decision of the Supreme court of California in *Graham* v. *Scissor-Tail, Inc.*, No. L.A. 31261 (Cal. Sup. Ct., filed Feb. 5, 1981), which held that the standard American Federation of Musicians Form B Contract imposed upon promoters is a contract of adhesion. In reaching this conclusion the court noted:

> "We believe that the contract here in question, in light of all of the circumstances presented, may be

fairly described as adhesive. Although defendant and its supporting amicus curiae are strenuous in their insistence that Graham's prominence and success in the promotion of popular music concerts afforded him considerable bargaining strength in the subject negotiations, the record before us fairly establishes that he, for all his asserted stature in the industry, was here reduced to the humble role of 'adherent.' It appears that all concert artists and groups of any significance or prominence are members of the A.F. of M.; that pursuant to express provision of the A.F. of M.'s constitution and bylaws members are not permitted to sign any form of contract other than that issued by the union. . . ." Slip op. at 14.

POINT I

The Business of Providing Agency Services to Actors Is Commerce Under the Sherman Act.

Petitioners are in the business of rendering agency services to actors.[4] That the Sherman Act was aimed at restraints on competition in the marketing of services as well as goods has long been acknowledged by the Supreme Court. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 493 (1940).

The AFL-CIO argues that the business of theatrical agents is not commerce under the Sherman Act because of the first sentence of section 6 of the Clayton Act, 15 U.S.C. §17, which states: "The labor of a human being is not a commodity or article of commerce." (AFL-CIO Br.

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[4] In stating that "throughout their brief petitioners never stop to identify the product market which allegedly is being restrained" (AFL-CIO Br.6), the AFL-CIO overlooked, *inter alia*, the petitioners' description of the restrained market as "the business of rendering agency services to actors" (Pet. Br.11). The market was also clearly identified in paragraphs 23 and 29 of the complaint (J.A. 22, 27).

6-7). This purportedly "incontrovertible" argument, improperly raised now for the first time,[5] is predicated upon the contention that the Equity-imposed restraints of trade (*e.g.*, fixing of agents' commission rates, boycott of agents) impact the labor market of union-member actors rather than the product market of theatrical agency services. (See AFL-CIO Br. 8).

Initially, it should be stated that the quoted sentence of section 6 could reasonably be interpreted as a simple introductory statement of the special dignity of human labor and the individual worker's right to use or withhold it as he sees fit. Certainly, in itself, that sentence does not exclude from coverage by the antitrust laws the business of non-labor parties who obtain employment for others.

In support of its strained interpretation, AFL-CIO relies primarily on a statement in *Apex, supra,* 310 U.S. at 503, that since the enactment of section 6 of the Clayton Act, "restraints on the sale of the employee's services to the employer . . . are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act." However, the Court in *Apex* did not analyze or rely on the first sentence of section 6, but simply quoted it without specific discussion, along with the portion of the second sentence which was relevant to that case. Since it was a striking labor union which was there alleged to have violated the Sherman Act, the Court's statement cannot fairly support the implication that "the sale of the employee's services to the employer" was intended to include

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[5] *Ramsey* v. *United Mine Workers,* 401 U.S. 302, 312 (1971); *Neely* v. *Martin K. Eby Construction Co.,* 386 U.S. 317, 330 (1967). The AFL-CIO concedes as much. It suggests that this Court in *Radovich* v. *National Football League,* 352 U.S. 445 (1957), failed to consider the same issue as that raised here because it was "neither raised in the Court of Appeals below or in opposition to the petitioner's writ for certiorari," and therefore "not properly before the Court" when first raised in the respondents' brief (AFL-CIO Br. 10).

the activities of non-union independent contractors whose services are utilized by union employees.

If anything is incontrovertible here, it is the fact that the challenged franchise regulations impact the business market of theatrical agency services, and that market is subject to coverage under the Sherman Act. Any possible doubts of petitioners' foregoing contentions are dispelled by Equity's admissions in:

A. instituting a separate action charging that the Agents "have unreasonably restrained trade *in the interstate commerce of the rendering of services by theatrical agents to actors,* in violation of Section 1 of the Sherman Act" by agreeing to regulate the commissions charged to Equity members;[6]

B. alleging as an affirmative defense in the amended answer in this action:

> "Plaintiffs themselves have combined and conspired to fix the commissions which they charge to Equity members, in violation of Section 1 of the Sherman Act" (J.A. 45);

and by the admission of the AFL-CIO that "The primary import of the agent regulation . . . is their impact on the commissions of agents" (AFL-CIO Br. 15 n. 11).

So far as petitioners have been able to determine, no court has ever held that restrictions on employment-related practices of non-labor parties were immunized from antitrust laws because parties which "deal in the labor of human beings" are outside of "commerce". It is particularly significant that *American Federation of Musicians* v. *Carroll,* 391 U.S. 99 (1968), did not so hold.

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[6] *Actors' Equity Association* v. *Bret Adams, Ltd., et al.,* No. 78 Civ. 4506 (CBM) (S.D.N.Y.), complaint para.21 (emphasis supplied).

POINT II

There Is No Labor Dispute Between Equity and the Agents Unless the Agents Are Part of Equity's Labor Group.

For the first time in this action, respondents (Resp. Br. 33 n. 32) and their *amici curiae* (Joint Br. 8) have put forth the proposition that this case involves a "labor dispute" under the Norris-LaGuardia Act, 29 U.S.C. §§101-115, even if petitioners are not held to be part of Equity's labor group. Thus, they argue that Norris-LaGuardia precludes injunctive relief and requires dismissal of this action—presumably, even if an antitrust violation would otherwise be found. This argument is both untimely[7] and devoid of merit.

The question of whether this case involves a "labor dispute" coincides precisely with the question of whether petitioners are part of the "labor group". Although the courts have often failed to articulate the connection between these issues, no case can be found in which a union combined with a nonlabor group to restrain commerce, and yet the court refused an injunction because the case involved a labor dispute.

The district court decision in *Carroll* v. *American Federation of Musicians*, 241 F.Supp. 865, 887 (S.D.N.Y. 1965), makes the connection between these issues clear in passages which were quoted with approval by this Court:

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[7] Equity's claim that "the courts below did not reach" this issue (Resp. Br.33 n.32) is misleading in view of the fact that this issue was never raised below—not in the amended answer; not in any of the memoranda presented to the district court; not in any of the separate briefs of respondents, AFTRA, or SAG in the Court of Appeals below; and, most extraordinarily, *not in opposition to the Agents' motion for a preliminary injunction*. Under these circumstances this issue is clearly not properly before this Court. *Ramsey* v. *United Mine Workers* and *Neely* v. *Martin K. Eby Construction Co., supra* note 5.

> "The criterion applied by the District Court in determining that the orchestra leaders were a 'labor' group and parties to a 'labor dispute' was the presence of a job or wage competition or some other economic interrelationship affecting legitimate union interests between the union members and the independent contractors. If such a relationship existed the independent contractors were a 'labor group' and party to a labor dispute under the Norris-LaGuardia Act." 391 U.S. at 105-06.

This Court described the issue in *Carroll* as follows:

> "The question is whether union practices of the petitioners affecting orchestra leaders violate the Sherman Act as activities in combination with a non-labor group, or *are exempted by the Norris-LaGuardia Act as activities affecting a 'labor group' which is a party to a 'labor dispute'.*" *Id.* at 101 (emphasis supplied).

See also *United States* v. *Fish Smokers Trade Council*, 183 F.Supp. 227, 229 (S.D.N.Y. 1960). The holding in *Milk Wagon Drivers' Local 753* v. *Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940), cited by the unions, was characterized as follows by the *Carroll* district court: "Picketing was upheld as a means of inducing independent contractors comprising a *labor group* to join a union". 241 F.Supp. at 889 (emphasis supplied). In the *Milk Wagon* case, the members of the labor group performed the same functions as the members of the union and competed with them for jobs. The unions' reliance on *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938) is similarly misplaced. That case stands only for the proposition that labor disputes protected by the Norris-LaGuardia Act are not limited to disputes between present employees and employers. They also include disputes "between persons seeking employment and employers." 303 U.S. at 561.

Thus, if this Court should agree with petitioners' basic position that they are independent businesses outside of

Equity's labor group, then the possibility that the case nevertheless arises out of a "labor dispute" is foreclosed.

POINT III

Equity's Franchising System Is Not Protected by the Nonstatutory Exemption.

The unions contend that if agents are not part of the labor group and the statutory exemption therefore does not apply, the franchising agreements between Equity and TARA[8] are immunized from the antitrust laws by the nonstatutory exemption. (AFL-CIO Br. 11-19, Resp. Br. 24-27). While petitioners agree with certain legal principles cited by the unions, such as that union restraints permissible under the nonstatutory exemption must be "no greater than necessary to eliminate wage competition among actors"[9] (AFL-CIO Br. 16), petitioners do not agree with the unions' conclusions "that the agreements between Actors' Equity and theatrical agents further 'a subject of immediate and legitimate concern to union mem-

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[8] TARA is a trade association of agents who compete with petitioners. See Pet. Br. 3 n.2.

[9] In this regard see *Connell, supra* note 3, 421 U.S. at 625 (holding that the union's organizing goals were a legitimate labor objective "but the methods the union chose are not immune from antitrust sanctions simply because the goal is legal"); *Adams, Ray & Rosenberg* v. *William Morris Agency,* 411 F.Supp. 403, 411 (C.D. Cal. 1976) (holding that William Morris had failed to demonstrate a likelihood of proving that the challenged union regulation of agents "gives the Guild [union] market control beyond that needed to further its legitimate interest in maintaining the wages of its members"); *Consolidated Express, Inc.* v. *New York Shipping Association,* 602 F.2d 494, 517-518 (3d Cir. 1979), *vacated on other grounds,* 100 S.Ct. 3040 (1980):

> "The requirements for antitrust exemption are, first, that the market restraint advance a legitimate labor goal, and, second, that the agreement restrain trade no more than is necessary to achieve that goal."

bers' and do no more than restrain wage competition" [10] (AFL-CIO Br. 15). While petitioners agree that the antitrust laws apply to "restraints on competition in the product market," those restraints are not limited to "the sort that businessmen in the market might undertake on their own." [11] (Resp. Br. 25).

The challenged conduct of Equity (group boycott, price fixing, agreement not to compete, monopolization, restraints upon a business market) is not protected by the nonstatutory exemption. *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100,* 421 U.S. 616 (1975) (*"Connell"*); *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965) (*"Pennington"*); *Allen Bradley Co.* v. *Local 3, IBEW,* 325 U.S. 797 (1945) (*"Allen Bradley"*); *Consolidated Express, Inc.* v. *New York Shipping Association, supra.* This is best demonstrated by *Connell,* where this Court noted that a very limited amount of joint union-nonlabor-group conduct was permitted by the nonstatutory exemption:

> "The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agree-

[10] The AFL-CIO contradicts this statement when it admits that "the primary import" of the franchising regulations "is their impact on the commissions of agents." AFL-CIO Br. 15 n.11. This admission is consistent with the admission that "the agreements here do not foreclose competition in any respect *other than to place a cap on the commissions agents may charge.*" AFL-CIO Br. 17 (emphasis supplied). Such a "cap," or fixing of the maximum price agents may charge, is illegal *per se. Albrecht* v. *Herald Co.,* 390 U.S. 145 (1968).

[11] Even if this were a correct statement of the law, it nevertheless is beyond dispute that the agents (who are independent "businessmen") "might undertake" to fix prices (i.e., commission rates) "on their own" without union assistance. See, *e.g., United States* v. *National Association of Real Estate Boards,* 339 U.S. 845 (1950) (involving a conspiracy by real estate brokers to fix commission rates for their services).

> ments be accorded a limited nonstatutory exemption from antitrust sanctions. *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965)." 421 U.S. at 622.

Accordingly, it is submitted that the nonstatutory exemption which rests upon the "congressional policy favoring collective bargaining" has no applicability here because Equity's collective bargaining with the producers, the employers of its members, remains unaffected by Equity's ability to franchise agents.[12]

The Court in *Connell* went on to point out that "the nonstatutory exemption offers no similar protection where a union and a nonlabor party agree to restrain competition in a business market." 421 U.S. at 622-23. The Court held that the nonstatutory exemption does not apply to those situations where unions impose a:

> "direct restraint on the business market [which] has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* at 625.

Here the franchising agreement between Equity and TARA, imposes direct restraints on the business market of procuring employment for actors in the legitimate theatre industry and the rendering of related services. These restraints have the actual and substantial anticompetitive effect of eliminating the Agents as competitors in the agency industry. Such restraints (*e.g.*, price fixing by agents) do not follow naturally from the elimination of competition between actors over wages and working con-

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[12] While the unions contend that the nonstatutory exemption is not limited to collective bargaining situations (AFL-CIO Br. 19 n. 14, Resp. Br. 34 n. 32), they do not cite any authorities which support their contention. In this regard see *Philadelphia World Hockey Club, Inc.* v. *Philadelphia Hockey Club, Inc.*, 351 F.Supp. 462, 499-500 (E.D. Pa. 1972).

ditions, but instead are artificial restraints imposed by Equity upon an independent group of businessmen, the Agents.

It is clear from the facts of the *Connell* case itself, and such cases as *Allen Bradley* and *Pennington,* that the elimination of the Agents as theatrical agents, does not follow naturally from the elimination of competition over wages and working conditions. In *Pennington,* the defendant union entered into an agreement with large mining companies whereby the union would seek "to impose the agreed-upon wage and royalty scales" of the collective bargaining agreement upon smaller mining companies, regardless of their ability to pay, the effect of which would be to eliminate the smaller companies from the industry. There, as here, the defendant union took the position "that since such an agreement concerned wage standards, it is exempt from the antitrust laws." 381 U.S. at 664. In rejecting this contention and holding that the union's conduct was subject to the Sherman Act, the Supreme Court stated that "there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws." *Id.* at 665. The Supreme Court's reference in *Connell* to the kind of restraint on competition which arises naturally from the elimination of competition over wages and working conditions, refers to conduct such as union members agreeing among themselves to fix the price of the services which they will charge employers, so that employers may be legally forced to pay all union members identical prices for their services, thereby losing their ability to negotiate with the union or its members in competition with each other. This is established by the following language from *Pennington*:

> "The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the em-

> ployers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe" (381 U.S. at 664);

and from *Connell*:

> "The Court therefore has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions. See *Mine Workers* v. *Pennington, supra,* at 666; *Jewel Tea, supra,* at 692-93 (opinion of WHITE, J.). Labor policy clearly does not require, however, that a union have freedom to impose direct restraints on competition among those who employ its members." 421 U.S. at 622.

It is clear from the foregoing that Equity's conduct in seeking to eliminate and destroy the business of theatrical agents who will not accept Equity franchises is not the kind of restraint on competition which arises naturally from the elimination of competition between union members for wages or the elimination of competition between employers in negotiating with a union with respect to wages and working conditions.

POINT IV

The Unions' Rationales for the Regulation of Agents Do Not Justify the Severe Restrictions Placed Upon Agents.

The unions offer three basic rationales to justify their pervasive regulation of agents:[13] (A) agents control ac-

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[13] The detailed rules and regulations of Equity's present pervasive and comprehensive franchising system for agents include the following provisions, *inter alia*:

a. only agents who are franchised by Equity may represent Equity members;

b. Equity may refuse to grant a franchise to an agent if in Equity's "opinion" the agent is "not qualified";

cess to employment; (B) the prohibition of commission on scale jobs is necessary to prevent invasion of union negotiated minimum wage scales; (C) regulation of the commissions agents may charge is necessary to prevent wage competition among union members. As previously noted, union restraints on non-union members are not immunized by the labor exemption unless it is shown that each restraint: (1) furthers a legitimate labor objective; and (2) restrains trade no more than necessary to achieve the desired objective. Moreover, the union has the burden of establishing the foregoing.[14] As will be demonstrated below, the union rationales do not permit Equity to satisfy the above burden and do not justify Equity's pervasive regulation of agents. Moreover, Equity has not even attempted to justify its extraction of franchise fees from agents.

A. *Agents' Control of Access to Employment.*

Admittedly, agents have greater access to producers and casting directors than most actors. Nevertheless, that cir-

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c. the limited terms and conditions under which agents may charge commissions (including the maximum commissions agents may charge);

d. the numerous duties and responsibilities of agents to Equity members;

e. the terms and conditions of contracts between agents and Equity members (including the duration of those contracts);

f. all disputes between an actor and an agent must be submitted to arbitration;

g. Equity may discipline agents, which discipline may include fines not to exceed $5,000, forfeiture of commissions, and franchise revocation;

h. agents must pay initial and annual franchise fees to the Union;

i. agents may not deal with producers who are on Equity's black list of producers;

j. Equity may waive compliance with the franchising requirements for agents it chooses to favor. (Pl. Ex. 71, R. 44 (p. 380), J.A. 209; Pl. Ex. 72, J.A. 245).

[14] *Consolidated, supra* note 9, 602 F.2d at 517.

cumstance does not justify the existence of Equity's franchising system since it is not "intimately related to wages, hours and working conditions" of union members (*Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676, 689 (1965)) which are determined by collective bargaining agreements negotiated without the participation of agents.

The unions have not cited any case nor have petitioners found any case which held that a union was justified in imposing restraints of trade upon independent business persons (who did not compete with union members)—simply because those independent persons had greater access to potential employers than union members.

Equity has not even attempted to show that the imposition of the following restraints of trade, *inter alia*, upon agents is justified merely because of the agents' greater access to employment opportunities than actors:

A. agents must pay franchise fees to the union;

B. agents cannot deal with producers who are on Equity's blacklist;

C. agents cannot collect commissions on scale or minimum wage jobs;

D. agents must submit disputes with Equity members to arbitration;

E. agents cannot collect commissions in accordance with governing state law.

B. *Regulation of the Commissions Agents May Charge Is Not Necessary to Prevent Wage Competition Among Union Members.*

The unions do not dispute the Agents' contention that, "There is no evidence that absent its franchising system Equity would be unable to 'eliminate wage competition among its members'." (Pet. Br. 23). Instead, the unions

now argue that regulation of agents' commissions is necessary because otherwise "actors could compete with respect to the percentage of their wages they were willing to cede to an agent in order to be accepted by the agent as a client." (AFL-CIO Br. 16). This argument has several flaws: (1) there is no evidence that actors compete with each other for the services of agents; (2) the money paid to agents is from an actor's disposable income not his wages, even though the amount of disposable income is measured by a percentage of the wages the agent obtained for the actor—thus there can be no "wage competition" in this respect; (3) absent the franchising system actors would continue to pay the customary 10% commissions to agents who obtained jobs for them. In order for actors to then engage in a "wage competition" for agents' services, they would have to offer agents a commission in excess of 10%, which would be violative of Article 11 of the General Business Law of the State of New York. Thus, there is no reasonable basis to project a "wage competition" among union members in the absence of union regulation of agents.

The unions also argue that regulation of commissions is necessary to prevent excessive commissions. This argument ignores the fact of state regulation of agents' maximum commissions and the Agents' undisputed contention that there is no evidence that any agent charged any actor an exorbitant commission or "a commission in excess of the 10% commission permitted" by state law.[15] (Pet. Br. 22).

Finally, it should be noted that despite the existence of similar "wage competition" in *Carroll*, the Supreme Court did not use this issue as a basis for its decision.

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[15] Equity's claim (Resp. Br. 6 n. 5a), that there is continuing "agent pressure for commissions exceeding ten percent of wages" is "supported" only by the testimony of one of its 23,000 members (Barbara Lea) that "in the mid-60's" an agent pressured her into paying more than 10 percent. The member, of course, did not complain to Equity (J.A. 161-162), did not identify the agent and did not know if the agent was licensed by the State of New York (R. 45 (p. 760)).

C. *The Prohibition of Commissions on Scale Jobs Is Not Necessary to Prevent Invasion of Union Negotiated Minimum Wage Scales.*

While the unions do not dispute the Agents' contentions: (1) that there is no evidence that a prohibition of commissions on scale jobs[16] helps Equity eliminate wage competition among members (Pet. Br. 31); and (2) that commissions are paid out of an actor's disposable income (Pet. Br. 24-25); they continue to insist that commissions nevertheless "directly and inevitably reduce the wages" of actors. (Resp. Br. 11-12). Apparently, aware of the weakness of this argument, the unions now also claim (without resort to any logical rationale or evidence in the record) that it is the agents' access to employment which justifies Equity's prohibition of commission on scale jobs. (See AFL-CIO Br. 18, n.13, Joint Br. 19-20, Resp. Br. 7, 31). However, as previously demonstrated, the agents' access to employment is not related to and does not affect minimum wages negotiated for union members by Equity and the various producers.

In *Carroll* the Supreme Court did *not* hold that the impact of agents' commissions upon the AFM's minimum wage structure justified union regulation of agents. Instead, it held that such regulation was justified by the agents booking "engagements for musicians at wages which were below union scale." 391 U.S. at 113. Such a finding is not possible here. (Pet. Br. 20-21).

D. *The Imposition of Franchise Fees Remains Unjustified.*

The unions make no effort to justify the imposition of franchise fees upon agents other than to incorrectly assert that the courts below made a "factual finding" that Equity's franchise fees were cost justified (Resp. Br. 32, n.30). In fact, the Court of Appeals held:

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[16] Union scale or minimum wage jobs should not be confused with the federally mandated minimum hourly wage, which was raised to $3.35 per hour for 1981. 29 U.S.C. §206(a)(1).

> "While the union argues that they [franchise fees] are necessary to pay the union's expenses in administering the franchise system, no evidence was presented at trial to show that the union's costs justified the franchise fees." 622 F.2d at 651 (J.A. 349-50).

In any event, the issue raised on this appeal is not whether the union's franchise fees are cost justified; rather, the issue as stated in the Petition for a Writ of Certiorari is:

> "4. Should the holding in *Carroll* be extended to permit the Union . . . to extract franchise fees [regardless of amount] from theatrical agents as payment for the right to be regulated and dominated by the Union?"

The unions do not address this issue.[17] While the unions' briefs attempt to justify the need of performers' unions to regulate agents by contending that such regulation is for "the purpose of promoting fair access to jobs and upholding union wage scales" and to eliminate "wage and job competition" between union members (Resp. Br. 6, 7), the unions do not contest the Agents' claim that a total absence of franchise fees would not affect an actor's access to jobs through an agent, interfere with union wage scales, or interfere with the union goal of eliminating wage and job competition. (Pet. Br. 32-33). Nor do the unions dispute the Agents' contention that *Carroll* did not sanction union extraction of franchise fees from agents (Pet. Br. 32).

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[17] Respondents' claim (Resp. Br. 32 n. 30) that part of the franchise fees are used to render services to agents, including arbitrations (which are forced upon agents under the franchising rules), has no support in the record and contradicts Equity's claim that its franchising "requirements benefit only union members" (Resp. Br. 7).

CONCLUSION

Petitioners request that the decisions of the Courts below be reversed and that this Court remand this case to the District Court for the issuance of appropriate injunctive relief.

Dated: New York, New York
March 13, 1981

Respectfully submitted,

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No. 80-348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

H. A. ARTISTS & ASSOCIATES, INC., *et al.*,
Petitioners,

v.

ACTORS' EQUITY ASSOCIATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations, a federation of 104 national and international unions with a total membership of 13,500,000 working men and women, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

We agree with respondents that the present case is controlled by *Federation of Musicians* v. *Carroll*, 391 U.S. 99, 113 (1968) because a union's licensing of agents, who effectively control job opportunities and otherwise act as intermediaries between workers and employers, with respect to

the sale of its members' labor is shielded by the statutory labor exemption from the antitrust laws. Moreover, we also agree with respondents that the statutory exemption is available here because this is not a case like *Allen Bradley* v. *Union,* 325 U.S. 797 (1965), in which there was an employer-union conspiracy aimed at driving other employers out of a product market so that the resulting economic advantage gained by the employer-conspirators might "trickle down" to the union workers. While each of respondents' points is sufficient to compel affirmance of the decision below, labor's historic concern with the use of the antitrust laws as a device to stifle legitimate and indispensable efforts to protect working conditions prompts us to file this brief which presents yet additional grounds for affirmance.

ARGUMENT

Introduction

Petitioners present this case to the Court as if the central issue were the lawfulness under the Sherman Act of agreements between Actors' Equity and certain theatrical agents. On that premise, petitioners ask the Court to decide whether those agreements fall within the labor exemption to the antitrust laws. But as we show first, most petitioners are not signatories to those agreements and are in no way restrained by the agreements. The only issue those petitioners are entitled to raise concerns the lawfulness of certain unilateral union conduct. And, the basic holding of *United States* v. *Hutcheson,* 321 U.S. 219 (1941) decides that issue against those petitioners. We then demonstrate that the correct answer to the "agreement" question the few remaining petitioners pose is that the agreements are lawful because: (1) they are limited to the "labor market" and excluded from the Sherman Act by § 6 of the Clayton Act; and (2) even if there is an impact on competition in a product market covered by the Sherman Act, the "nonstatutory" exemption protects the agreements.

I

As the District Court noted, "most" of the petitioners are not party to any agreement with Actors' Equity. 478 F. Supp. 496, 499. The gravamen of their complaint against Actors' Equity is that the union disciplines members who seek employment through any theatrical agent who is unwilling to abide by the restrictions established by Actors' Equity through its agent regulation. Petitioners term the promulgation and enforcement of that rule a "group boycott." But whatever the epithet attached to the course of conduct followed by Actors' Equity, one critical fact cannot be obscured: the non-signatory petitioners' challenge is to entirely *unilateral union conduct in the union's self-interest.*

The agent regulation promulgated by Actors' Equity embodies that organization's considered response to the hazards its members face in an overpopulated labor market characterized by short-term jobs in which "an actor [seeking employment] without an agent does not have the same opportunity to be taken seriously as an actor who has an agent." 478 F. Supp. at 497. The regulation provides, in essence, that actors may pay an agent's commission of up to ten percent of salary so long as that payment does not result in the actor receiving less than the minimum wage negotiated by the union, that agents must meet the fiduciary obligations inherent in an agency relationship and that agents may not use their economic leverage to lock an actor into an unreasonable exclusive agreement.

These restrictions meet a common problem—the vulnerability of those seeking work in a highly-competitive casual labor market—by substituting for individual weakness group strength in the form of a collective decision designed to order the competition for jobs in that market. Further, Actors' Equity decided *on its own* to safeguard its members who are seeking jobs by issuing the protective provisions included in the rule; the union decided *on its own* to license agents who agree to abide by the rule; and the

union decided *on its own* to discipline its members who deal with unlicensed agents. The finding of the District Court, not disturbed by the Court of Appeals, was that there is

> * * * no evidence to suggest the existence of any conspiracy or illegal combination between Actors' Equity and * * * Theatrical Artists Representatives Association ("TARA") a trade association of agents working in the legitimate theatre field * * * or between Actors' Equity and producers. The Actors' Equity franchising system was employed by Actors' Equity for the purpose of protecting the wages and working conditions of its members. [478 F.Supp. at 498-99.]

This finding establishes that this case, in contrast to *Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), does not concern a situation in which a union, in league with some employers, takes particular action against other employers.

Thus, with regard to most of the petitioners, the license agreements between Actors' Equity and agents who have agreed to abide by the agent regulation are red herrings. The majority of the petitioners are agents who have *not* signed such an agreement. The substance of the agreements other agents have signed does not restrain those petitioners who have not signed such agreements. Nor have the nonsignatory petitioners shown that the existence of such agreements in itself adversely affects them. As a matter of logic and of law, then, the sole complaint of the nonsignatory petitioners is that Actors' Equity, on its own, has determined to discipline its members who seek employment through agents who do not agree to comply with the agent regulation. It is this "boycott"—and *not* any agreement—that the nonsignatory petitioners contend precludes them from the market and thus restrains their trade. But the applicability of the labor exemption to such unilateral union conduct is clear. This much was settled forty years ago in *United States* v. *Hutcheson*, 312 U.S. 219 (1941), where the Court, in an opinion by Mr. Justice Frankfurter, held as follows:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or the wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. [*Id.* at 232.]

Hutcheson thus teaches that workers are free to decide collectively to withhold their services—to boycott—in pursuit of union objectives (such as those here), and that the antitrust laws do not apply to such union conduct. And that principle has been reaffirmed by this Court in every subsequent labor exemption case including most recently in *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616, 621-22 (1975):

> The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-LaGuardia Act, 47 Stat. 70, 71, and 73, 29 U.S.C. §§ 104, 105, and 113. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities including secondary picketing and boycotts, from the operation of the antitrust laws. See *United States* v. *Hutcheson*, 312 U.S. 219 (1941).

With regard to the petitioners who have declined to sign a licensing agreement, that well-settled proposition dictates the conclusion, reached by the courts below, that the labor exemption protects the conduct of Actors' Equity.

II

A few petitioners apparently did sign agreements with Actors' Equity. Those petitioners—and only those petitioners—do have the claim that they are unlawfully restrained by the terms to which they agreed. But as we now

show this challenge must fail because the agreements at most restrain competition in a labor market and thus are exempted from antitrust scrutiny by § 6 of the Clayton Act.

It is instructive that throughout their brief petitioners never stop to identify the product market which allegedly is being restrained by the agreements made by the respondent union. Petitioners do, of course, contend that they are independent businessmen, and that the union is regulating the conduct of their business in a manner which violates the Sherman Act. But petitioners pass by the question of whether their business is within the protection of that statute. The answer is that it is not so protected.

Section 1 of the Sherman Act declares in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Section 2 of the Sherman Act likewise gears its prohibition of monopolization to

> any part of the trade or commerce among the several States, or with foreign nations * * *.

But the first sentence of § 6 of the Clayton Act provides:

> That the labor of a human being is not a commodity or article of commerce.

The "business" of the petitioner theatrical agents is precisely to deal in the labor of human beings—actors and actresses—in securing employment for them and in negotiating and policing the terms and other working conditions through which these performers are compensated for that labor. Thus, despite the considerable controversy concerning the legal effect of § 6 (and particularly its elaborate second sentence), it is incontrovertible that the first sentence of that section takes the business of theatrical agents

(and others who deal in the labor of human beings) out of the antitrust laws by excluding them from the "commerce" which the Sherman Act protects.

That this portion of § 6 is to be accorded its full force is confirmed—if confirmation be necessary—by its sponsor's explanation of his language. What is now the first sentence of § 6 was proposed on the floor of the Senate by Senator Cummins as part of a comprehensive amendment to the section.[1] Senator Cummins explained the import of the first sentence of his amendment as follows:

> I precede the amendment I have offered with the statement that ought to be in the law somewhere, for it would solve many of the problems which have vexed the courts and vexed those who have discussed the question, namely, that the labor of a human being is not a commodity or article of commerce. It is high time that we recognize the difference between the power of a man to produce something and the thing which he produces. Society has the right to regulate the sale and the transportation of the thing produced, but society has no right, according to our views of civilization, to say that a man who has the capacity to work shall work. He is free to either work or to abstain from working. He is free to persuade others to abstain from working. The thing in which he is dealing is not a commodity, and if we do not recognize the difference between the labor of a human being and the commodities that are produced by labor and capital and their transportations throughout the country we have lost the main distinction which warrants, justifies, and demands that labor organizations coming together for the purpose of bettering the conditions under which they work, of lessening the hours which they work, and of increasing the

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[1] 2 E. Kintner, *The Legislative History of the Federal Antitrust Laws and Related Statutes*, 2366 (1978).

> wages for which they work shall not be reckoned to be within a statute which is intended to prevent restraints of trade and monopoly.[2]

While the Cummins amendment was defeated,[3] the manager of the bill immediately thereafter proposed to add the first sentence of the amendment to the bill, and the Senate concurred.[4] Senator Cummins' words thus represent the definitive statement of Congressional intent.

Referring to § 6, the Court declared in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 503 (1940):

> [I]t would seem plain that restraints on the sale of the employee's services to the employer, however much they curtail the competition among employees, are not in themselves combinations or conspiracies in restraint of trade or commerce under the Sherman Act.

Regulation of a theatrical agent who acts as an intermediary between an employee and an employer concerning a job, is a form of "restraint on the sale of the employee's services to the employer" and thus, by virtue of § 6, not a combination or conspiracy in restraint of "trade or commerce" under the Sherman Act.

Nothing in this Court's subsequent decisions has undermined the authority of the foregoing passage in *Apex Hosiery*. In *Allen Bradley* the Court limited the *second* sentence of § 6 when it held that

> "the purpose of mutual help" can hardly be thought to cover activities for the purpose of "employer-help" in controlling markets and prices." [325 U.S. at 808] [5]

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[2] *Id.* at 2367.

[3] *Id.* at 2378.

[4] *Id.* at 2378-79.

[5] At an earlier stage in the analysis the entire § 6 is quoted (325 U.S. 803-04, n. 9) and that provision is paraphrased in the text at 804.

But *Allen Bradley* did not vitiate the force of *Apex Hosiery's* interpretation of the first sentence of §6.

In *United States* v. *Real Estate Boards,* 339 U.S. 485, the Court determined that a combination and conspiracy to fix the commission rates of real estate brokers in the sale, exchange, lease and management of real property in the District of Columbia was a violation of § 3 of the Sherman Act. In deciding the case in favor of the defendant brokers, the district court "seemingly [had been] influenced" by § 6, including the provision that the labor of a human being is not a commodity or article of commerce. *See* 339 U.S. at 489. In rejecting that analysis this Court said:

> But we think it a misconception to assimilate the services involved here to those of employees or to compare the present case to those involving the application of the antitrust laws to labor unions. Cf. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469; *United States* v. *Hutcheson,* 312 U.S. 219. We do not have here any more than we did in *American Medical Assn.* v. *United States,* 317 U.S. 519, or *United States* v. *Women's Sportswear Mfrs. Assn.* 336 U.S. 460, cf. *Columbia River Packers Assn.* v. *Hinton,* 315 U.S. 143, an aspect of the employee-employer relationship to which the antitrust laws have made special concessions. [339 U.S. at 489-490] [6]

In *Radovich* v. *National Football League,* 352 U.S. 445, plaintiff alleged that he had been blacklisted by the defendant football league and its member clubs as part of a conspiracy to destroy the All America Conference, a competitive professional football league in which Radovich once played. As the final argument in its brief the National Foot-

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[6] The principal issue in *Real Estate Boards* was whether the defendant real estate brokers were engaged in a "trade" within the meaning of § 3 of the Sherman Act, a question which the Court answered in the affirmative. *Id.* at 489-492.

ball League asserted that

> The Clayton and Norris-LaGuardia Acts Specifically Exempt From the Antitrust Laws, Plaintiff's Claim For Relief Set Out in the Complaint [7]

In the course of that argument the NFL relied, *inter alia*, on § 6, and the paragraph of the *Apex Hosiery* case from which we quoted at p. 8, *supra*.[8] In holding that the complaint was sufficient to state a cause of action the Court did not discuss respondents' reliance on the Clayton and Norris-LaGuardia Acts. The point may have been deemed too insubstantial to mention because of the complaint's allegations regarding monopolization of the football industry, or because the point was not properly before the Court, as petitioner had pointed out:

> The labor law issue presented by respondents was neither raised in the Court of Appeals below or in opposition to the petitioner's writ for certiorari.[9]

Against this background we believe it would be improper to read *Radovich* as *sub silentio* imposing a novel limitation on § 6 or overruling the construction of that provision in *Apex Hosiery*.

Nowhere in their brief do petitioners address § 6 of the Clayton Act. The omission is well-advised, since the terms of that provision remove them from the protection of the Sherman Act. Petitioners are not in a product market protected by the Sherman Act, and the challenged regulations are exclusively in the labor market. The complexities which have confronted this Court in other cases in which labor union activities have been challenged under the Sherman Act thus are simply not present here.

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[7] Brief for Respondent *National Football League, et al.*, No. 94, Oct. Term, p. 59 (heading).

[8] *Id.*, pp. 61-62.

[9] *Id.*, Reply Br. for Pet., p. 20.

III.

Even if this case were properly viewed as involving agreements in a product market between a labor and non-labor group, the result would be unchanged. For even on that assumption, the agreements here—like the agreement in *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965) (and unlike the agreements in e.g., *Allen Bradley* and *Connell*) — would fall within the "limited nonstatutory exemption from antitrust sanctions" afforded "some agreements between unions and nonlabor parties." *Connell Co., supra*, 421 U.S. at 622.

By their terms, § 20 of the Clayton Act and § 4 of the Norris-LaGuardia Act exempt from the reach of the Sherman Act certain specified union actions during a labor dispute. Those sections do not "expressly deal [] with arrangements or agreements between unions and employers," as the Court observed in *Pennington*, 381 U.S. at 662. Yet, as *Pennington* itself makes plain, certain such agreements are squarely within the labor exemption. For the policy animating those provisions, and animating § 6 of the Clayton Act as well, requires what the Court has termed a "nonstatutory" exemption for certain agreements between labor and non-labor groups.

"The nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions." *Connell Co.*, 421 U.S. at 622. The Court has recognized that there is a tension between this "labor policy" favoring collective action to regulate labor markets and the policy of the antitrust laws which favors price competition to regulate product markets, since "successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards." *Apex Hosiery Co., supra* 310 U.S. at 503. From *Apex Hosiery* to *Connell*, therefore,

the Court consistently "has acknowledged that labor policy requires tolerance for the lessening of business competition based on differences in wages and working conditions." *Connell Co., supra,* 421 U.S. at 622. As Chief Justice Stone put it in *Apex Hosiery,* the "elimination of price competition based on differences in labor standards • • • has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." 310 U.S. at 503-04.

Determining whether a particular agreement between labor and nonlabor parties qualifies for the nonstatutory exemption thus "is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws." *Jewel Tea Co., supra,* 381 U.S. at 689. The accommodation the Court has arrived at in its decisions since *Apex Hosiery* is this: Where an agreement is of "immediate and legitimate concern to union members," (*Jewel Tea Co., supra,* 381 U.S. at 692), and where "the effect on the product market • • • results from the elimination of competition based on wages [or working conditions]," (*Pennington, supra,* 381 U.S. at 664), the agreement is exempt from antitrust liability. Conversely, where an agreement is not responsive to an "immediate and legitimate concern" of a union and imposes a "direct restraint on the business market [which] would not follow naturally from the elimination of competition over wages and working conditions" (*Connell Co., supra,* 421 U.S. at 625), the agreement is not exempt.

In *Pennington,* the Court applied this analysis to distinguish between agreements fixing the price at which an employer sells his product — agreements which are not exempt from antitrust scrutiny—and agreements fixing the wages employers pay their employees—agreements which are exempt. Agreements which themselves establish prices of a product, the Court stated, do not qualify for antitrust immunity even if prompted by a union's desire "to protect its wage scale by maintaining employer income," because "the restraint on the product market is direct and im-

mediate * * * and the unions get from the promise nothing more concrete than a hope for better wages to come." 381 U.S. at 663.[10] Wage agreements, in contrast, are plainly lawful, even when consummated with a multi-employer unit comprised of horizontal competitors, as "the union benefit * * * is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit." *Id.* at 664.

Similarly, in *Jewel Tea,* the Court viewed agreements concerning hours of work and agreements establishing marketing hours as posing distinct antitrust issues. The Court readily concluded that an agreement regulating when employees may work would fall within the nonstatutory exemption, for "although the effect on commerce is apparent and real, perhaps more so than in the case of wage agreements, the concern of union members is immediate and direct." 381 U.S. at 691. As to the agreement prohibiting night operation of meat departments, however, the Court concluded that the applicability of the nonstatutory exemption depended on the resolution of "a narrow factual question: Are night operations without butchers, and without infringement of butchers' interests, feasible?" *Id.* at 694. If so, the agreement restricting night operations would not be exempt, for "the obvious restraint on the product market * * * would stand alone, unmitigated and unjustified by the vital interests of the union butchers." *Id.* at 692. If, on the other hand, night operations "would be impossible without night employment of butchers, or an impairment of the butchers' jurisdiction, or a substantial effect on the

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[10] An agreement which, in form, is addressed to prices can nonetheless in substance approximate a wage agreement, and thus be exempt: "The crucial determinant is not the form of the agreement—e.g., prices or wages—but its relative impact on the product market and the interests of union members." *Jewel Tea, supra,* 381 U.S. at 690 n. 5.

butchers' workload," then the agreement restricting night operations would be lawful, "for then operating hours, like working hours, would constitute a subject of immediate and legitimate concern to union members." *Id.* Since the district court had resolved this factual dispute in the unions' favor (and since the findings were not clearly erroneous), this Court upheld the lawfulness of the marketing hours agreement.

Finally, in *Connell,* the Court applied the same analysis in finding not exempt an agreement reached outside of a collective bargaining relationship which prohibited an employer from subcontracting to nonunion firms. The Court recognized that the union's aim in seeking the agreement—"organizing as many subcontractors as possible"—"was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers fact from nonunion firms." 421 U.S. at 625. But the Court found the particular means the union had adopted—securing agreements which absolutely barred subcontracting—impermissible because "This kind of direct restraint on the business market has substantial anticompetitive effects * * * that would not follow naturally from the elimination of competition over wages and working conditions." *Id.* The Court elaborated:

> The agreements with Connell and other general contractors indiscriminately excluded nonunion sub-contractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods. * * * [T]he restriction on subcontracting would eliminate competition on all subjects . . . even on subjects unrelated to wages, hours, and working conditions. [*Id.* at 623-24]

Implicit in *Connell* is the proposition that if the agreement had done nothing more than eliminate competition over wages and working conditions—if, for example, the union

had secured Connell's promise not to subcontract with firms paying "substandard wages"—the agreement would have been exempt from antitrust liability.

Here, as in *Jewel Tea* (and unlike *Connell*), the findings of the district court (which were not disturbed by the court of appeals) establish that the agreements between Actors' Equity and theatrical agents further "a subject of immediate and legitimate concern to union members" and do no more than restrain wage competition.[11] Consequently, the agreements fall within the nonstatutory exemption.

The critical fact in this case, as found by the district court, is that in the theatrical industry agents play a central role in securing employment for actors:

> As a matter of general industry practice, producers seek actors and actresses for their productions through agents. Testimony in this case convincingly established that an actor without an agent does not have the same access to producers or the same opportunity to be seriously considered for a part as does an actor who has an agent. Even principal interviews, in which producers are required to interview all actors who want to be considered for principal roles, do not eliminate the need for an agent who may have a greater chance of gaining an audition for his client.
>
> • • •
>
> Testimony confirmed that agents play an integral role in the industry; without an agent, an actor would have significantly lesser chances of gaining employment. [478 F. Supp. at 497, 502.]

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[11] The primary import of the agent regulation and of the agreements under it—and the primary challenge to those agreements—is their impact on the commissions of agents. Although the regulation has certain other provisions (*e.g.*, requiring agents to meet their fiduciary obligations) we, like the courts below and like petitioners in this Court, focus on the provisions of the regulation addressed to commissions.

Given that role, it follows that for actors, obtaining employment is a two-step process: first, the actor secures an agent, and second, the agent secures a job for the actor with a producer. Wage competition among actors can occur at either step in the process, and the union has an "immediate and direct" interest in seeking to eliminate such competition at each step. The collective bargaining agreements between Actors' Equity and the producers limit wage competition at the second step by establishing a floor for wages; the effect of the producers' agreement not to pay wages below the floor is, of course, to preclude Equity members from selling their services to producers below the floor. But absent additional action by Actors' Equity, wage competition among members still could occur at the first step of the employment-securing process: actors could compete with respect to the percentage of their wages they were willing to cede to an agent in order to be accepted by the agent as a client. The agreements at issue limit such competition by establishing a ceiling on commissions for agents (which ceiling also serves as a floor below which actors cannot sell their services to agents); the agents' commitment not to charge commissions above the ceiling precludes actors from selling their services to agents for less than the rates established by the agreements. The agreements thus serve the most vital of interests of the union since, as the court of appeals recognized, "the union cannot eliminate wage competition among its members without regulation of the fees of the agents." 622 F.2d at 651.

In short, any restraint on the agents' product market (still assuming, contrary to our showing in Part II, that agents have such a market) is no greater than necessary to eliminate wage competition among actors. Unlike the situations in *Allen Bradley* and *Connell*, and the allegations in *Pennington*, no employer has been foreclosed from the market by virtue of the agreements at issue here; to the contrary, the district court found that "Actors' Equity has invited [petitioners] to become refranchised, but [petitioners] have

decided to remain unfranchised." 478 F. Supp. at 499. Nor is this a case in which the union was active in aid of an employer conspiracy to fix the price of goods and services or otherwise to restrain competition for goods and services in order to obtain the indirect benefit that the favored employers would be able to pay higher wages or provide more jobs to union members when competition from employers was eliminated.[12] And finally, the agreements here do not foreclose competition in any respect other than to place a cap on the commissions agents may charge. That cap, of course, is the very device which restrains *wage* competition.

The agreements here, then, are analytically indistinguishable from the agreement involved in *Teamsters Union* v. *Oliver*, 358 U.S. 283 (1959) fixing the price trucking companies would pay truck drivers for the lease of their vehicles. In *Jewel Tea* the Court explained *Oliver* thusly:

> Though in form a scheme fixing prices for the supply of leased vehicles, the agreement [in *Oliver*] was designed "to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs." *Id.* at 293-294. As the agreement did not embody a " 'remote and indirect approach to the subject of wages' . . but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract," *id.*, at 294, the paramount federal policy of encouraging collective bargaining proscribed application of the state law. [381 U.S. at 690 n. 5]

[12] In Justice Jackson's characteristically pungent phrase, this is not a case in which the "benefits to organized labor" are being "utilized as a cat's-paw to pull employers' chestnuts out of the antitrust fires." *U.S.* v. *Women's Sportswear Manufacturers Assn.*, 336 U.S. 460, 464 (1949), citing *Allen Bradley*. *See also Pennington*, *supra*, 381 U.S. at 663, quoted at p. 12, *supra*.

Oliver is especially relevant here—and petitioners' failure to discuss it especially significant—because it completely disposes of petitioners' recurring refrain that the existence of a collectively-bargained wage scale for actors obviates the union's interest in regulating agents. In *Oliver* the union had negotiated a wage scale for truck drivers. But the Court recognized that the union retained a vital interest in regulating truck rental fees, since absent such regulation an owner-driver could engage in wage competition by charging a "rental which did not cover his operating costs" and "mak[ing] up his excess costs from his driver's wages." 358 U.S. at 294. Similarly, here, the existence of a wage agreement with the *producers* is not alone sufficient to eliminate wage competition among actors in seeking *agents*, and thus does not diminish the union's interest in regulating agents.

Oliver likewise disposes of petitioners suggestion (Br. at 25) that the licensing agreements here stand on the same footing as an agreement which fixes "the price a producer charges for admission to his play." [13] An agreement with a producer over ticket prices would, in the words of *Oliver*, constitute at best a "*remote and indirect* approach to the subject of wages"; as the Court stated in *Pennington*, the union would "get from the promise nothing more concrete than a hope for better wages to come." In contrast, the licensing agreements here represent "a *direct frontal attack* upon a problem thought to threaten the maintenance of the basic wage structure," namely, the danger of wage

[13] Petitioners' further suggestion (Br. at 23-24) that to uphold the agreements here the Court would have to permit agreements which fix the prices of anyone whose "activities affect actors' disposable income" is even more far-fetched. The union here seeks to regulate agents *not* because they "affect actors' disposable income," but because agents—unlike landlords, grocers and the like—control access to employment for actors. Regulation of agents prevents wage competition among actors; regulation of, e.g., landlords would not.

competition occurring among actors in seeking agents. And since the licensing agreements affect price competition only by restraining wage competition, their lawfulness is established by the unbroken line of decisions from *Apex Hosiery* to *Connell*.[14]

CONCLUSION

For the reasons stated above as well as for those stated in the brief for the respondents, the decision below should be affirmed.

Respectfully submitted,

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[14] That the agreements here are not collective bargaining agreements with employers of Actors' Equity members does not alter the conclusion. While collective bargaining agreements are particularly strong candidates for protection by the "nonstatutory exemption" because of the "federal policy favoring collective bargaining," *Connell, supra,* 421 U.S. at 626, the nonstatutory exemption can extend to any agreement not covered by the "statutory" exemption, *viz.* to any agreement with a "non-labor" party. Indeed, the thrust of the Norris-LaGuardia Act was to make clear that labor's antitrust exemption was not limited to situations in which an employer-employee relationship exists, and thus to overrule decisions such as *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921).

In *Connell* the company and union which had signed the agreement in question had no collective-bargaining relationship, yet the Court did not view that fact as dispositive. Rather, Connell's agreement not to subcontract with nonunion firms was found unlawful because of its anticompetitive effects, see p. 14, *supra*. The Court's entire analysis of the effects of the agreement would not have been necessary were the "nonstatutory" exemption available only to collective bargaining agreements.

IN THE

Supreme Court of the United States

October Term, 1980

No. 80-348

H.A. ARTISTS & ASSOCIATES, INC., et al.,

Petitioners,

against

ACTORS' EQUITY ASSOCIATION,
an unincorporated association, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SCREEN ACTORS GUILD, INC., WRITERS GUILD OF AMERICA, WEST, INC., AND WRITERS GUILD OF AMERICA, EAST, INC., AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-348

H. A. ARTISTS & ASSOCIATES, INC., et al.,
Petitioners,

against

ACTORS' EQUITY ASSOCIATION,
an unincorporated association, et al.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

BRIEF OF AMERICAN FEDERATION OF TELEVISION AND RADIO ARTISTS, SCREEN ACTORS GUILD, INC., WRITERS GUILD OF AMERICA, WEST, INC., AND WRITERS GUILD OF AMERICA, EAST, INC., AS *AMICI CURIAE*, IN SUPPORT OF RESPONDENTS

American Federation of Television and Radio Artists ("AFTRA"), Screen Actors Guild, Inc. ("SAG"), Writers Guild of America, West, Inc., and Writers Guild of America,

East, Inc. (together "WGA") submit this brief, as *amici curiae,* in support of respondent Actors' Equity Association ("Equity"), in order to advise the Court as to their interest in this controversy and their position on the issues raised.[1] The *amici curiae* hereby adopt the Statement of Facts set forth in the brief of respondent Equity.

INTEREST OF THE *AMICI CURIAE*

SAG, AFTRA and WGA[2] all have long-standing regulations and by-laws similar to those of Equity, instructing members to deal only with agents who have agreed with the unions to treat their members fairly.[3] The background leading to the adoption of such regulations and by-laws is set forth below (pp. 8-14). Indeed, all "entertainment" unions found it necessary to promulgate such regulations because experience had shown that, without such union regulations, the activities of agents had deleterious effects on wages and other conditions of employment for actors, writers and others ("performers").

This brief is filed to demonstrate to the Court how economic necessities prompted these entertainment unions to regulate the relationships between their members and talent agents. The circumstances surrounding the adoption of agent regulations underscore the lower courts' findings that they protect the wages and working conditions of the members of

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[1] Pursuant to Rule 36.2 of the Rules of this Court, written consents by all parties to the filing of this brief have been obtained and are being filed with the Clerk of the Court concurrently with this brief.

[2] SAG represents performers engaged in the motion picture and television industries. AFTRA represents the interests of artists engaged in television and radio. WGA represents motion picture and television writers. All are certified labor organizations under Title 29 of the United States Code.

[3] Rule 16(g) of Rules and Regulations of Screen Actors Guild ("SAG Agency Regulations Rule 16(g)"); AFTRA Rule 12(b); WGA Working Rule No. 23.

the entertainment unions and are, therefore, protected under the labor exemption to the antitrust laws.

We urge the Court to reaffirm its holding in *American Federation of Musicians of the United States and Canada* v. *Carroll,* 391 U.S. 99, 113 (1968), which clearly governs the instant case, to provide continued stability by adhering to the principles of *stare decisis,* and to affirm the unanimous decisions of the courts below.

SUMMARY OF ARGUMENT

This Court concluded in *American Federation of Musicians* v. *Carroll,* 391 U.S. 99, 113 (1968), that booking agent regulations similar to those challenged here are " 'intimately bound up with the subject of wages,' *Oliver II, supra,* at 606," and are therefore within the labor exemption from the antitrust laws. This Court expressly affirmed (391 U.S. at 113) the finding of the trial court (241 F. Supp. 865, 893) that the union and the agents were parties to a labor dispute since "[agents] are in an economic interrelationship with the members . . . such that the [unions] are justified in regulating their activities." Since (1) the agents' impact on wages justified union regulation, (2) disputes about such regulations were labor disputes and (3) "[t]he Norris-LaGuardia Act took all 'labor disputes' as therein defined outside the reach of the Sherman Act" (391 U.S. at 106), disputes about the union's agent regulations were therefore beyond the reach of the antitrust laws.

No clearer definition of the agent's function can be drafted than that in the Norris-La Guardia Act's list of activities which may be the subject of a labor dispute: "representation of persons in...seeking to arrange terms or conditions of employment." 29 U.S.C. § 113. Agents "arrange terms and conditions of employment." Under the statutory definition, therefore, disputes involving agents' activities are labor disputes, and a union's regulation of its members' relationships with agents is "outside the reach of the Sherman Act." *Carroll,* 391 U.S. at 106.

The history of the entertainment unions' struggle with agents who charged exorbitant commissions which were often rebated to the employer, and the nature of the entertainment industry, demonstrate beyond doubt, and all the courts which have considered the question have agreed, that agents directly and vitally affect the wages and working conditions of performers. Equity's regulations, first adopted in 1928, received authoritative judicial approval. *Edelstein* v. *Gillmore,* 35 F.2d 723 (2d Cir. 1929), *cert. denied,* 280 U.S. 607 (1930). Judge Swan in *Edelstein* v. *Gillmore* found that Equity's regulations were lawfully "calculated . . . to improve conditions of employment of actors." These findings characterize and illuminate the legality of the regulations adopted by the entertainment unions in the period following *Edelstein* v. *Gillmore.* For reasons similar to those of Equity, and in reliance on the judicial approval in *Edelstein* v. *Gillmore* of Equity's regulations, other entertainment unions soon adopted comparable rules. The *amici,* like Equity, concluded that regulation was a necessary device to eradicate the abuses of the agent system and, in view of *Edelstein* v. *Gillmore,* a lawful method of doing so. *Carroll* confirmed the legality of such regulations and assured these unions that maintenance of those long-standing union rules would not subject them to antitrust liability.

The court below rejected petitioners' strained attempts to distinguish *Carroll,* finding that "the union cannot eliminate wage competition among its members without regulation of the fees of the agents." 622 F.2d 647, 651. In their brief to this Court, petitioners misstate the opinions and evidence in *Carroll* and rely on claimed distinctions that would not, even if true, justify a different result. For example, petitioners' primary claim — that the American Federation of Musicians ("AFM") did not regulate agents in fields where it had collective agreements — is both untrue[4] and irrelevant. Nowhere do petitioners present reasons why these claimed distinctions dictate a different result. There are none.

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[4] 241 F. Supp. at 881, 883-84; 372 F.2d 155, 158-59.

Nor have petitioners shown any justification for this Court to ignore *stare decisis* by accepting petitioners' invitation to overrule *Carroll*. *Stare decisis* provides stability in the application of legal rules and imposes a "severe burden on the litigant who asks [the Court] to disavow one of [its] precedents." *Thomas* v. *Washington Gas Light Co.*,—U.S.—, 100 S. Ct. 2647, 2656 (1980). Petitioners do not seriously attempt to meet that burden. No supervening decision of this Court nor any other court casts doubt on *Carroll*'s viability; the one subsequent decision by this Court in this area cites *Carroll* approvingly: *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 622 (1975). The lower courts have followed *Carroll* faithfully and without difficulty.

On the other hand, overruling *Carroll* would violate the core principles of *stare decisis* by victimizing those unions which have acted in accordance with settled legal principles and would disrupt the entire entertainment industry. Reversal of *Carroll* and its judicial antecedents and progeny (1) would shatter long-standing union practices adopted some fifty years ago in reliance on explicit judicial approval, (2) would spawn extensive litigation in an area hitherto free of controversy, and (3) could create labor strife since entertainment unions would be compelled to seek contractual hiring procedures and to assume the agents' negotiating role. Proper deference to the salutary purposes of *stare decisis* demands rejection of petitioners' flimsily supported invitation to this Court to abandon controlling precedent.

Finally, adherence to *stare decisis* is especially compelling since *Carroll* is consistent with the clear line of decisions by this Court. See cases cited, 391 U.S. at 106. This Court has repeatedly declared that the Clayton and Norris-La Guardia Acts were intended to foreclose judicial scrutiny of union activities undertaken in self-interest. Only when a union joins a business conspiracy or combines with business interests to restrain product competition may its activities be challenged. To overrule *Carroll* would also undermine this line of precedents.

Equity's regulation of agents furthers the legitimate union goal of improving members' working conditions and compensation. Equity and the other entertainment unions have not sought to restrain competition among agents and clearly have no economic incentive to do so. The interests of entertainment union members are best served by robust competition among agents, and there is no shred of evidence in this or any other case that the entertainment unions have abandoned those legitimate interests in order to limit such competition, or to benefit agents who submit to union regulations. Thus, under *Carroll* and earlier supporting authority, the agent regulatory systems of the entertainment unions should remain exempt from the antitrust laws.

ARGUMENT

POINT I

TALENT AGENTS PERFORM FUNCTIONS DIRECTLY AFFECTING TERMS AND CONDITIONS OF EMPLOYMENT; UNION REGULATION OF THEIR MEMBERS' RELATIONSHIPS WITH TALENT AGENTS IS NECESSARY AND LAWFUL.

A. A Dispute Concerning Union Regulation of Agents Constitutes a "Labor Dispute" as Expressly Defined in the Norris-La Guardia Act and is Therefore Outside the Reach of the Antitrust Laws

In *American Federation of Musicians* v. *Carroll,* 391 U.S. 99, 106 (1968), this Court held that:

> The Norris-La Guardia Act took all "labor disputes" as therein defined outside the reach of the Sherman Act and established that the allowable area of union activity was not to be restricted to an immediate employer-employee relation. *United States* v. *Hutcheson,* 312 U.S. 219, 229-236, *Allen Bradley* v. *Union, supra,* at 805-806; *Los Angeles*

> *Meat & Provision Drivers Union* v. *United States, supra,* at 103; *Milk Wagon Drivers' Union* v. *Lake Valley Farm Prods.,* 311 U.S. at 91.

Since the activities of the booking agents were "intimately bound up with the subject of wages" (391 U.S. at 113), the agents, albeit independent contractors and outside the immediate employer-employee relationship, were still parties to a "labor dispute" within 29 U.S.C. § 113. Consequently, the union could regulate the booking agents' activities and those regulations were exempted from the antitrust laws.

No clearer definition of the agent's function can be designed than that in the Norris-La Guardia Act's definition of a labor dispute. Section 13, 29 U.S.C. § 113, defines a "labor dispute" as including any controversy concerning:

> representation of persons in negotiating, fixing, maintaining, changing, or *seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.* (Emphasis added.)

Agents "arrange terms and conditions of employment" for performers. One need go no further than the statutory definition of a labor dispute to ascertain that a dispute concerning a union's regulation of its members' dealings with agents comes squarely within the labor exemption to the antitrust laws.

Since agents perform tasks traditionally performed by unions, it is not merely coincidental that the Norris-La Guardia definition of labor dispute precisely includes disputes relating to activities identical to the agents' functions. The agent negotiates, as do unions; the agent obtains jobs, as do unions through hiring halls and other mechanisms; the agent presents the performer's grievances to the employer, a traditional union function. In acting as a surrogate for the unions and as a representative of their members, the agent may indisputably become a party to a labor dispute and union regulation of

agents is therefore "outside the reach of the Sherman Act." *Carroll,* 391 U.S. at 106.[5]

In addition, petitioners here seek *only* injunctive relief and this highlights the controlling force of the Norris-La Guardia Act in this case. For this Court has never deviated from the incontrovertible proposition that injunctions are precluded in cases involving labor disputes. See, *e.g., Milk Wagon Drivers' Union, Local No. 753* v. *Lake Valley Farm Products, Inc.,* 311 U.S. 91, 101, 103 (1940); *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U.S. 552, 560-62 (1938). Whatever the result may be where plaintiffs seek other relief, the demand for injunctive relief alone must fail where the litigants are parties to a labor dispute.[6]

B. The History of the Entertainment Unions' Regulation of Their Members' Relationships With Agents Demonstrates the Need for Those Union Regulations and Their Legality

A review of the origins of the entertainment unions' regulation of agents demonstrates that such regulations were and are needed to protect performers' wages and working

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[5] Petitioners' claim that agents have no greater "economic interrelationship," in the Norris-La Guardia sense, with performers than with landlords or grocers ignores the statutory definition of a labor dispute. Congress has made it clear that agents may be parties to a labor dispute; it has not done so with respect to landlords and grocers. The lower courts here correctly found, moreover, that agents' "commissions are directly and proportionately related to wages." 478 F. Supp. 496, 504; 622 F.2d 647, 650.

[6] *Lake Valley* has never been overruled. See extended discussion in *Utilities Services Engineering, Inc.* v. *Colorado Building & Construction Trades Council,* 549 F.2d 173 (10th Cir. 1977). In *Connell Construction Co.* v. *Plumbers & Steamfitters Local Union No. 100,* 421 U.S. 616, 637 (1975), this Court noted that the jurisdictional issue was not present since the plaintiffs there, unlike the petitioners in the present case, had sought a declaratory judgment. *Cf., Corporate Printing Co.* v. *New York Typographical Union No. 6,* 555 F.2d 18 (2d Cir. 1977). Here, however, petitioners seek only injunctive relief banned by the Norris-La Guardia Act, and *Lake Valley* compels the conclusion that the federal courts lack jurisdiction.

conditions, and that they were and are consequently legal. That history shows that the regulations addressed universally acknowledged abuses, were unilaterally adopted after careful consideration, without intent to restrain business competition, and were instituted in reliance upon express, authoritative precedent upholding the legality of the earlier Equity regulations.

Prior to union regulation of talent agents, members often worked for less than the unions' minimum wage scales because of the amounts exacted from them by agents in order to obtain those very jobs. Agents frequently rebated part of the monies they received from the performer-employee to the employer[7] — a patent evasion of the union's negotiated wage structure; they

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[7] A. Harding, *The Revolt of the Actors* (1929), Joint Appendix ("J.A.") 291, 315, 317. Reports from contemporary periodicals and newspapers detailed those abuses. See, *e.g.*, "New Rules for Actors", *New York Times*, September 24, 1928, at 20, col. 3:

> Certain managers . . . have turned the casting of their plays over to an agent who has been required to pay them for the privilege. In such cases, an actor who signed a contract at $100 a week would be paying $5 weekly to the agent and an additional $5 weekly to the manager for the run of the play. This would be in addition to the two payments to the agency before he could go to work.
>
> Equity had hoped that the New York law governing employment agencies could be invoked to correct these conditions, but has now given up that idea. It will deal with them through its remarkable control over its own members. The regulations adopted last week are aimed to remedy injustice to the actor. They provide for the fair treatment of him which was intended under the law. Refusing to allow Equity members to deal with agents who do not comply with Equity's requirements compels obedience. Under circumstances highly favorable to the actor an agent may act as a personal representative. Under no circumstances will he be permitted to split his fees with managers or producers.
>
> The power of the actors' union appears to be used here with the discretion and control for which it has been notable since its origin. People outside the theatre might imagine that an actor out of work could scorn an agent's services and go directly to the producer, but there are more players than positions, and producers have found it convenient and not at all expensive to use agents.

(continued)

often assumed the dual roles of casting director for the employer and agent for the employee. In these and other ways, the activities of agents thwarted the unions' legitimate efforts to improve the terms and conditions of their members' employment.

The detrimental impact of talent agents prior to union regulation mirrored similar abuses in other fields by employment agents who extracted payments from job-hungry workers seeking employment. Even today, farm workers and others continue to be victimized by so-called "contractors" who, like talent agents prior to union regulation, control access to jobs and extort disproportionate fees, often rebating portions of those fees to the employer. Most unions representing casual, transient workers, *e.g.*, construction and maritime workers, have attempted to cure this problem through the establishment of hiring halls.[8]

(continued)

See also, *The New Republic,* October 24, 1928, at 263:

> The grievances which [Equity] seeks to cure are of long standing. Agencies have, of course, a legitimate service to perform in relation to the employment of actors and actresses. It is their business to discover what openings there are for actors and what actors are available to fill them. They bring the actor and the manager together, and if the actor is their client, they give him advice in negotiating his bargain with the manager. But the business is obviously one which lends itself to chicanery and abuse . . . [Agents] have demanded 10 percent or more of the actor's salary for the entire run of the engagement, and they have usually succeeded in enforcing the demand. They were able to enforce it because several important producing firms would not hire actors or actresses except through designated agents, in which case the producer himself received a percentage of the commission. He managed in this way to extort perhaps a 5 percent rebate on the salary which he had agreed to pay the performer.

[8] See, *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *National Labor Relations Board,* 365 U.S. 667, 672-74 (1961), noting the authorities to the effect that such mechanisms "ha[ve] served well both labor and management," and quoting Senator Taft that "[t]he employer should be free to make a contract with the union as employment agency. The union frequently is the best employment agency."

These abuses had sparked extensive governmental inquiry and attempts at correction as early as 1890,[9] and in the year preceding Equity's adoption of its regulations, Mr. Justice Stone outlined those abuses that had particularly aroused governmental concern with employment agencies, abuses identical to those that compelled Equity and other entertainment unions to protect their members by regulating agents. *Ribnik* v. *McBride,* 277 U.S. 350, 359-75 (1928) (Stone, Holmes, Brandeis, JJ., dissenting). Justice Stone noted that exhaustive governmental studies[10] showed that, *inter alia:* (1) "the agencies, left to themselves, very generally charge extortionate fees" (277 U.S. at 365); (2) "[f]ee-splitting [with the employer] has been a recurrent subject of complaint" (*id.* at 367); and (3) "at times of widespread unemployment the private agencies are known to raise their fees out of all proportion to the reasonable value of their services" (*id.* at 368).

Unfortunately, governmental regulations had proven so haphazard and ineffective as to have been described as "a miserable failure" as early as 1914,[11] and, indeed, despite the undisputed abuses, the majority in *Ribnik* v. *McBride* com-

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[9] "The evils incident to private employment agencies first arrested public attention in America about 1890." *Adams* v. *Tanner,* 244 U.S. 590, 600 (1917) (Brandeis, Holmes, Clarke, JJ., dissenting), *overruled, Ferguson* v. *Skrupa,* 372 U.S. 726 (1963). In that classic opinion, Mr. Justice Brandeis described in detail the abuses of workers by private employment agencies and the exhaustive governmental investigations and studies of the problem, noting that the abuses by employment agencies had been summarized in United States Bureau of Labor Bulletin No. 109, p. 36. *Id.* at 601. Justice Brandeis quoted and described other voluminous studies to the same effect in the United States and other countries. *Id.* at 602-05.

[10] "For thirty years or more the evils found to be connected with the business of employment agencies in the United States have been the subject of repeated investigations, official and unofficial, and of extensive public comment." 277 U.S. at 363. Justice Stone cited extensively from the contemporary literature, including, *inter alia,* the report to the Congress of the Commission on Industrial Relations, 64th Cong., 1st Sess., Sen. Doc. No. 415. *Id.* at 364-68.

[11] *Adams* v. *Tanner,* 244 U.S. at 605.

pletely emasculated existing attempts at state regulation by holding New Jersey's regulation of agents to be outside the state's constitutional authority.[12]

The majority's holding in *Ribnik* v. *McBride* created a vacuum in the regulation of agents and "removed the last faint, lingering scruple from [theatrical] agencies which had made a gesture of obedience [to state Law]."[13] These consequences prompted Equity to adopt by-laws regulating agents.[14] Equity attempted with these by-laws to cure the very abuses summarized by Mr. Justice Stone in *Ribnik* v. *McBride, e.g.,* excessive commissions and fee-splitting with the employer by the talent agent.[15]

The system established by Equity's regulations, essentially identical to the present system, was immediately challenged. In *Edelstein* v. *Gillmore,* 35 F.2d 723 (2d Cir. 1929), *cert. denied,* 280 U.S. 607 (1930), Judge Swan, writing for himself and Judge Augustus N. Hand, concluded that Equity's agent regulations were a lawful effort to improve the employment conditions of its members. The Second Circuit found that:

> *The evils of unregulated employment agencies (using this term broadly to include also the personal representative) are set forth in the defendants' affidavits and are corroborated by common knowledge* . . . Hence the requirement that, as a condition to writing new business with Equity's members, old contracts with its members must be made to conform to the new standards, does not seem to us to justify an

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[12] That holding was subsequently overruled unanimously. *Olsen* v. *Nebraska,* 313 U.S. 236 (1941).

[13] Harding, *The Revolt of the Actors,* J.A. at 322-25. As that author notes, those governmental regulations had proved ineffective even prior to *Ribnik* v. *McBride* and had not been uniformly adopted nor enforced by the states. *Ibid.,* J.A. at 314, 316, 319. The affidavits submitted by Equity in *Edelstein* v. *Gillmore,* 35 F.2d 723 (2d Cir. 1929), *cert. denied,* 280 U.S. 607 (1930), also substantiate the ineffectiveness of governmental regulation, and describe Equity's decision that union regulation was necessary.

[14] Harding, *The Revolt of the Actors,* J.A. at 322-23.

[15] *Ibid,* J.A. at 323-25.

> inference that the primary purpose of the requirement is infliction of injury upon plaintiff, and other personal representatives in a similar situation, rather than the protection of the supposed interests of Equity's members. *The terms they insist upon are calculated to secure from personal representatives better and more impartial service, at uniform and cheaper rates, and to improve conditions of employment of actors by theater managers.* Undoubtedly the defendants intend to compel the plaintiff to give up rights under existing contracts which do not conform to the new standards set up by Equity, but, as already indicated, *their motive in so doing is to benefit themselves and their fellow actors in the economic struggle.* The financial loss to plaintiff is incidental to this purpose.

35 F.2d at 726 (emphasis added). This Court denied *certiorari,* 280 U.S. 607 (1930).

With the legality of Equity's actions established by *Edelstein* v. *Gillmore,* other entertainment unions soon adopted agent regulations comparable to those found lawful in *Edelstein* v. *Gillmore.* The AFM adopted similar internal membership rules in 1936, instructing its members to deal only with agents whose activities did not adversely affect the terms and conditions of employment of those members. Those regulations were adopted only after extensive study of the problem by the AFM and, in essentially the same form, were upheld by the Court in *Carroll.* 241 F. Supp. 865, 881-82, 892-93; 391 U.S. at 113.

SAG too emulated the Equity rules legitimized in *Edelstein* v. *Gillmore,* and, in 1939, adopted similar rules. Again, this action was taken only after lengthy consideration of agent abuses. SAG's Executive Committee had commenced study of the issue by November 1937, when it was reported to the committee that numerous complaints relating to agents had been received. These complaints concerned abuses such as conflicts of interest, rebates, double commissions, commingling of funds, and excessively long term contracts. After a survey of its membership, regulations were presented in 1938 by SAG's

Board of Directors to the membership and, after lengthy discussion within SAG and with agents' representatives, became effective in November 1939. In 1949, SAG's Agency Relations Committee reviewed the regulations and found that, although abuses still occurred, the situation had been significantly ameliorated.

For similar reasons, both AFTRA and WGA adopted comparable regulations.[16] Thus, every major entertainment union has found it necessary to regulate agents. All have focused particular attention on the problem of the agent's conflict of interest, and all prohibit agents from accepting rebates from employers, acting as employer and the like.[17]

Moreover, despite the vigorous efforts of the unions, there is a continuing need for such union regulation of agents, even in jurisdictions where the agents are regulated by state law.[18] This is clear from a Staff Report to the Federal Trade Commission by its Los Angeles Regional Office, in 1972, which stated that:

> The evidence obtained during that initial investigation indicated that thousands of people in California, and in other areas of the country, lose significant amounts of money as a result of deceptive and fraudulent practices by these so-called "agencies."[19]

Given these economic realities, the indissoluble economic interrelationship between performers and agents, and the continuing existence of agent abuses, the entertainment unions' regulation of agents constitutes a necessary and reasonable activity to protect their members' conditions of work and compensation.

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[16] WGA Working Rule No. 23; AFTRA Rule 12(b).

[17] WGA Artists' Manager Basic Agreement of 1976 ¶¶ 6(c), 8, 1976 Rider W ¶ 5; SAG Agency Regulations Rule 16(g) Sections V, XVI, XXVI.

[18] California regulates agents. Ca. Labor Code § 1700. See, *Adams, Ray & Rosenberg* v. *William Morris Agency, Inc.*, 411 F. Supp. 403 (C.D. Ca. 1976).

[19] Staff Report to the Federal Trade Commission, *Talent and Modeling Agencies in Southern California*, p. 1, September 1972.

POINT II

EQUITY'S REGULATIONS ARE INDISTINGUISHABLE FROM THOSE IN *CARROLL* AND ARE LIKEWISE WITHIN THE LABOR EXEMPTION TO THE ANTITRUST LAWS.

A. This Court Found in *Carroll* that Regulations Similar to Those Involved Here are "Intimately Related to Wages" and Exempt from the Antitrust Laws

In *Carroll,* the AFM had established comprehensive regulations covering, *inter alia,* wages to be paid musicians, number of musicians to be employed, hours of work, restrictions on work by members outside the territory of their local, prices to be charged by orchestras employing AFM musicians, and relationships with booking agents who secure engagements for AFM members. As to these booking agents, this Court found that:

> We think also that the caterer and booking agent restrictions "are at least as intimately bound up with the subject of wages," *Oliver II, supra,* at 606, as the price floors. The District Court found that the booking agent regulations were adopted because of experience that "many booking agents charged exorbitant fees to members and booked engagements for musicians at wages which were below union scale." 241 F. Supp., at 881-882. On the basis of these findings, the District Court concluded:
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> > "Because the activities of the booking agents here have and had a direct and substantial effect on the wages of the members of [the unions], I find that they are in an economic interrelationship with the members . . . such that the [unions] are justified in regulating their activities . . . Furthermore, I find the regulations to be reasonably related to their interest in maintaining observance of union scale wages and working conditions." 241 F. Supp., at 893.

391 U.S. at 113.

Comparing Equity's regulations to those of the AFM challenged in *Carroll* demonstrates their similarity:

AFM	Equity
Pursuant to the provisions of Federation's By-Laws, each such booking agent must enter into a standard form of license agreement with Federation under which *he agrees not to charge more than a 10% commission on steady engagements, a 15% commission on single engagements,* not to book non-union musicians, and not to book orchestras for less than union scale wages and working conditions.	Under Actors' Equity agency regulation system, agents are required to secure licenses, also known as permits or franchises, from Actors' Equity in order to represent Actors' Equity members. *Licensed agents must abide by a schedule of maximum commissions established by Actors' Equity* and must adhere to other rules designed to protect Actors' Equity members.
241 F. Supp. at 881 (emphasis added).	478 F. Supp. 496, 497-98 (emphasis added).

As in *Carroll,* the lower courts here concluded that Equity's regulations were instituted "for the purpose of protecting the wages and working conditions of its members." 478 F. Supp. at 499. The Second Circuit found here that agents, "because of industry structure, stand athwart the current of wages paid by employers to union members" and that "it is necessary or customary for union members to secure employment through agents." 622 F.2d 647, 650. See also, *Edelstein* v. *Gillmore.*

The similarity of the facts in *Carroll* and in the present case is indisputable. Indeed, the agent regulations arose out of the same abuses: misrepresentation of services; failure to provide services; and exorbitant fees for unperformed or improperly performed services.[20] However, agents are indispensable to the careers of performers.[21] Moreover, both the AFM and Equity

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[20] *Carroll* v. *AFM,* 241 F. Supp. at 881-82; Harding, *The Revolt of the Actors,* J.A. at 312-18; Testimony of Theodore Bikel, J.A. 164, 165-66.

[21] *Carroll* v. *AFM,* 241 F. Supp. at 893; *H.A. Artists & Associates, Inc.* v. *Actors' Equity Association,* 478 F. Supp. at 497; 622 F.2d at 650.

regulations were adopted after extensive studies of the problem and possible alternatives for its solution.[22] Most importantly, the essential features of the regulations are identical:[23] members are permitted to deal only with agents who have agreed (1) to honor their fiduciary obligations by avoiding conflicts of interest, (2) not to charge excessive commissions and (3) not to book members for jobs paying less than the union minimum. In these respects, there are no material distinctions between *Carroll* and the present case.

B. Petitioners' Attempts to Distinguish *Carroll* are Both Inaccurate and Unpersuasive

Petitioners' claimed distinctions from *Carroll* are inaccurate and illusory. Contrary to petitioners' contentions, collective bargaining agreements are present in both *Carroll* and the present case. The AFM did not limit its regulation of agents to club dates, which involved no collective bargaining agreements. As both the District Court and the Second Circuit found in *Carroll,* the AFM set maximum commissions for steady engagements, which are generally governed by collective bargaining agreements, and for club date engagements. Both types of engagements are booked by agents. 241 F. Supp. at 881, 883-84; 372 F.2d 155, 158-59. Clearly, AFM's collective bargaining agreements in recording, television and other fields did not obviate the need for the regulation of agents, and regulation in those fields was upheld in *Carroll.* [24]

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[22] *Carroll* v. *AFM,* 241 F. Supp. at 881-82; Harding, *The Revolt of the Actors,* J.A. at 315-18, 322-25.

[23] *Carroll* v. *AFM,* 241 F. Supp. at 881; *H.A. Artists & Associates* v. *Actors' Equity,* 478 F. Supp. at 497-98.

[24] Petitioners cannot argue that the AFM regulated agents only where there was no collective bargaining. The lower courts in *Carroll* had made clear that this licensing applied in all fields:

> The licensing agreements limit the commissions of booking agents to 10% for steady engagements and 15% for single engagements.

372 F.2d at 159; 241 F. Supp. at 881. Since collective bargaining agreements are present in the non-club date fields (391 U.S. at 104, n.6), this Court recognized that agents were regulated in fields of musical employment characterized by collective agreements.

Similarly, petitioners' assertion that *Carroll* is distinguishable because booking agents were only peripherally involved there (Pet. Br., p. 18) is untrue. Petitioners ignore the extended discussion by the District Court in *Carroll* of this "peripheral" issue. 241 F. Supp. at 881-82, 892-93. The issue was presented, briefed, argued and adjudicated by this Court.[25] 391 U.S. at 113. And the fact that theatrical agents are governed by New York State neither distinguishes *Carroll* nor provides justification to outlaw union efforts to protect their members' interests. Indeed, such state regulation of agents existed when Equity's system was created, but union regulation of agents was still found necessary in view of its ineffectuality.[26] See pp. 11-12, *supra*. Petitioners can cite no authority for the extraordinary and unsupportable proposition that otherwise lawful union activity becomes unlawful by reason of governmental attempts to cure the same evils. Unions are not foreclosed from seeking to improve safety conditions by reason of the existence of the Occupational Safety and Health Administration, from bargaining for shorter hours by reason of

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[25] The pretrial order in *Carroll* specified "regimentation of booking agents" as one of the issues before the District Court (Appendix, *American Federation of Musicians* v. *Carroll*, Nos. 309-310, O.T. 1967, 111); plaintiffs called as witnesses eight booking agents who were not members of the AFM nor orchestra leaders, including Willard Alexander, president of one of the largest booking agencies; the trial court listed the AFM's "regulating [of] booking agents" as one of the issues to be litigated (241 F. Supp. at 886), and adjudicated the issue (*id.* at 892-93); the issue was among the questions on which this Court granted *certiorari* (Cross-Petition for Writ of *Certiorari*, No. 310, pp. 2-3, 6 (questions presented: Nos. 1, 2, 4, 20)). Petitioners' argument has been explicitly and uniformly rejected by the lower courts. *Redfield* v. *American Federation of Musicians*, Civ. 78-7530, 603 F.2d 214 (2d Cir. 1979); *Garrett* v. *American Federation of Musicians*, 78-1 (CCH) Trade Cas. ¶ 61,888 (D.S.C. 1978); *Adams, Ray & Rosenberg* v. *William Morris Agency*.

[26] As noted above (p. 11), Mr. Justice Brandeis had adverted to the ineffectiveness of state regulation of private employment agencies as early as 1917. *Adams* v. *Tanner*, 244 U.S. at 605-06. See also, *Edelstein* v. *Gillmore; Adams, Ray & Rosenberg* v. *William Morris Agency*.

federal or state regulation of hours of employment, nor from bargaining in other areas to amplify the protections afforded workers by government regulation.

Petitioners raise various other alleged factual distinctions between *Carroll* and the instant case. Pet. Br., 20-27. None deserves extended analysis. Most are merely reformulations of the points analyzed above and are also inaccurate and irrelevant:

(1) Petitioners claim that "unlike *Carroll,* where the employers paid the booking agents who in turn paid the union members, *here the producers pay the actors directly.*" Pet. Br., p. 21 (emphasis in original). Untrue. In the typical situation covered by collective bargaining agreements, the musical employers in *Carroll,* like the employers here, paid the performer, not the agent. 372 F.2d at 159; 241 F. Supp. at 876. In club dates, where it was assumed that the leader was the employer (391 U.S. at 105), the leader paid the musicians.

(2) Petitioners claim that the instant case differs from *Carroll* since there is no evidence here that theatrical agents "charged exorbitant fees." Pet. Br., 22. In fact, the District Court in *Carroll* found that the abuses that led to the adoption of the AFM regulations were eliminated by the regulations, so that exorbitant agent fees were no longer a substantial problem. 241 F. Supp. at 882, 892 ("The regulations adopted were successful."). Petitioners' attempted distinction blatantly ignores the history of the last half century and the Second Circuit's findings in *Edelstein v. Gillmore.* It is strange logic indeed to suggest that union conduct found lawful in *Edelstein* v. *Gillmore* becomes unlawful because it sought the mitigation of widespread abuses and succeeded.

Petitioners' other distinctions between *Carroll* and the present case ignore the fact that agents who are indispensable to performers do not merely "affect" their disposable income, but actually control their very access to *any* income from

performing. As a result, it is a given in the entertainment industry that discussion of the performer's ability to obtain employment and his actual income must take into consideration the agent's fiduciary obligations and commission. The performer's actual income is not merely what the employer has agreed to pay, whether scale wages or more.

Clearly, it is the danger to union members inherent in the absence of regulation that justifies union limitation on excessive commissions. The unions' success in eliminating the problem through regulation does not render the regulation itself unlawful.

POINT III

STARE DECISIS DICTATES THAT *CARROLL* NOT BE OVERRULED

A. This Court's Precedents Should Not Be Overruled Without Overwhelming Reason To Do So

Where, as here, there are no overwhelming reasons to overrule, *stare decisis* commands that precedents as direct as *Carroll* and *Edelstein* v. *Gillmore* not be scuttled. No supervening change, economic or jurisprudential, has occurred mandating the destruction of these long-standing union rules first declared lawful more than fifty years ago. As we shall show, overruling *Carroll* would unfairly prejudice those unions that have adopted and maintained agency regulations in reliance on explicit judicial approval and would bring instability and labor strife where none presently exists.

As Mr. Justice Stevens made clear only last Term:

> The doctrine of *stare decisis* imposes a severe burden on the litigant who asks us to disavow one of our precedents. For that doctrine not only plays an important role in orderly adjudication; it also serves the broader societal interests in evenhanded, consistent, and predictable appli-

> cation of legal rules. When rights have been created or modified in reliance on established rules of law, the arguments against their change have special force.

Thomas v. *Washington Gas Light Co.*,—U.S.—, 100 S. Ct. 2647, 2656 (1980) (footnotes omitted). This position has been repeatedly confirmed by the Court. Mr. Justice Harlan has stated:

> Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors.

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970). See also, *e.g.*, *Helvering* v. *Hallock*, 309 U.S. 106, 119 (1940); *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).[27]

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[27] Justice Brandeis' maxim in *Burnet* v. *Coronado Oil & Gas* is often cited (285 U.S. at 406):

> *Stare decisis* is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right. . . .This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation.

See also, *Gilman* v. *Philadelphia*, 3 Wall. (70 U.S.) 713, 724 (1866) ("it is almost as important that the law should be settled permanently, as that it should be settled correctly.").

B. Congress has Approved *Carroll*'s Construction of the Labor Exemption to the Antitrust Laws

Moreover, *Carroll* and the present case involve questions of interpretation of the Norris-La Guardia Act. "[C]onsiderations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 736 (1977) (White, J.). Congress has not hesitated in the past to correct perceived misconstructions of its statutes by the Court in this very area. Much of the development of the labor laws is the result of specific Congressional reaction to decisions by the Court which Congress considered contrary to its declared labor policy. See, *e.g., United States* v. *Hutcheson,* 312 U.S. 219, 234 (1941); *United Mine Workers of America* v. *Pennington,* 381 U.S. 657 (1965). It is critical, therefore, that in the twelve years since *Carroll,* Congress has shown no interest in overruling that decision.

C. Overruling *Carroll* Would Violate the Core Principles of *Stare Decisis* and Would Disrupt Industry Practices Adopted and Maintained in Reliance Upon Judicial Approval

No supervening decision of this or any other court casts doubt on the continuing validity of *Carroll.* On the other hand, ignoring the Court's many precedents and overruling *Carroll* would cause the very disruptions sought to be prevented by *stare decisis.* To overrule *Carroll* and invalidate the entertainment unions' long-standing agent regulatory systems at this late date would throw the industry into chaos and leave a vacuum in which agent abuses may once again flourish unhindered.[28] Nothing has occurred in the years since *Carroll* to warrant such a drastic upheaval of the entertainment industry. The lower courts have uniformly followed *Carroll* and have experienced no difficulty in doing so.[29]

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[28] Testimony of Theodore Bikel, J.A. at 171-72.

[29] See, *e.g., Redfield* v. *AFM:*

The central issue raised by this appeal is whether the activities of

Overruling *Carroll* would violate the core principles of *stare decisis* and would have serious detrimental impact. First, as we have shown above (pp. 12-14), the *amici* adopted agency regulations subsequent to and in reliance upon the favorable authority of *Edelstein* v. *Gillmore*. This Court's decision in *Carroll* corroborated the propriety of the regulations and made it clear that these unions could maintain those regulations without legal entanglement. Subjecting these unions now to antitrust damage suits, including treble damage awards, after fifty years of judicial approval, would be palpably unfair. Second, reversal of *Carroll* would foster litigation in an area previously free of legal controversy. Eager plaintiffs would institute suits seeking the financial windfalls provided by treble damage awards. The unions would be compelled to litigate extensively in the hopes of preserving these vital membership interests. Third, labor strife could ensue as unions seek to replace the existing system of obtaining jobs through agents with contractual hiring procedures. Those traditional union responses to unfair employer hiring practices would probably be strongly resisted by employers loath to abandon the advantages of the present hiring system.[30] Similarly, the unions might

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> the AFM in its relationships with booking agents such as plaintiff fall within this exemption.
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> * * *
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> As with the orchestra leaders, the regulations here were instituted unilaterally by the union and voluntarily acquiesced in by plaintiff. Clearly there is an economic relationship between the booking agent and the musician. The agent obtains a commission based on the contract that he secures for the musician. Moreover, the purpose of the restrictions is aimed at protecting the musicians from booking agents who may charge exorbitant fees or contract for work at lower than going rates.

Slip Op. at 1-2. See also, *e.g.*, *Adams, Ray & Rosenberg* v. *William Morris Agency; Garrett* v. *AFM*.

[30] Union demands for hiring halls and other contractual hiring practices are a mandatory subject of bargaining under the National Labor Relations Act and strikes to obtain such hiring procedures would be lawful, protected activity. See, *e.g.*, *Houston Chapter, Associated General Contractors,* 143 N.L.R.B. 409 (1963), *enforced,*

attempt to preempt the agents' negotiating function in order to spare their members that expense and to ensure the preservation of union wage scales.

D. Overruling *Carroll* Will Severely Undermine the Court's Consistent Line of Authority on this Issue

Adherence to *stare decisis* is especially compelling since *Carroll* is consistent with a clear line of decisions by this Court. 391 U.S. at 106. The Court has repeatedly declared that the Clayton and Norris-La Guardia Acts were intended to foreclose judicial scrutiny of union activities undertaken in self-interest. Under the standards set forth by these precedents, Equity's regulation of agents is properly exempt from the antitrust laws. These standards have not been questioned in any way by Congress, and *Carroll* cannot be overruled without doing violence to these precedents and the standards they articulate.

This Court declared in *United States* v. *Hutcheson* that the Norris-La Guardia Act requires that:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

312 U.S. at 232 (footnote omitted). See also, *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 501, 506, 508 (1940); *Allen Bradley Co.* v. *Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U.S. 797, 808 (1945); *Local 24, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL-CIO* v. *Oliver,* 358 U.S. 283, 291-94 (1959); *Los Angeles Meat & Provision Drivers Union* v. *United*

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349 F.2d 449 (5th Cir. 1965), *cert. denied,* 382 U.S. 1026 (1966); *cf., Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *National Labor Relations Board,* 365 U.S. 667, 672-73, 676 (1961).

States, 371 U.S. 94, 97-98 (1962); *United Mine Workers of America* v. *Pennington.*

Mr. Justice White summarized these precedents clearly in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO* v. *Jewel Tea Co., Inc.,* 381 U.S. 676, 690 (1965): the "crucial determinant is not the form of the agreement—*e.g.,* prices or wages—but its relative impact on the product market and the interests of union members."

Thus, only when a union joins a business conspiracy or combines with business interests to restrain competition may its activities be challenged, and Equity's regulation of agents does not restrain competition.

The entertainment unions have not sought to restrain competition among agents and clearly have no economic incentive to do so. Indeed, the only groups which clearly benefit from the systems are the unions' memberships. The interests of the unions' members are best served by robust competition among agents, and there is no shred of evidence in this or any other case that the entertainment unions have abandoned those interests. Finally, experience has shown that regulation of agents is the effective method of curbing agent abuses.

E. Petitioners Offer No Reason to Overrule *Carroll*

Petitioners proffer no reason for the Court to accept their invitation to overrule *Carroll* and ignore the principles of *stare decisis.* Pet. Br., 29-30. None exists. That invitation must therefore be rejected, for:

> We must respect the solemn decisions of our predecessors and associates, as we may wish that those who succeed us should respect ours, or the supreme law of the land, so far as depends on judicial interpretation, will change with the change of judges.

Ex-parte Crane, 5 Pet. (30 U.S.) 190, 202-03 (1831).

CONCLUSION

It is respectfully submitted that the decisions of the District Court and the Court of Appeals should be affirmed.

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Respectfully submitted,

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